/00-3403

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

No. 00-3403-CR

v.

NANCY R. LAMON,

Defendant-Appellant-Petitioner

ON REVIEW OF THE DECISION OF
THE COURT OF APPEALS, DISTRICT IV,
AFFIRMING THE JUDGMENT OF
THE ROCK COUNTY CIRCUIT COURT,
HONORABLE EDWIN C. DAHLBERG, PRESIDING

APPELLANT'S BRIEF AND APPENDIX

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ISSUES PRESENTED

1. Whether a trial court's decision rejecting a challenge under Batson v. Kentucky, 476 U.S. 79 (1986) to a prosecutor's use of a peremptory challenge to strike a black juror is entitled to any deference on appeal where the trial court has no opportunity to judge the stricken juror's credibility.

2. Whether a prosecutor's refusal to ask any voir dire questions of a black juror she has peremptorily challenged is evidence of discrimination under Batson v. Kentucky, 476 U.S. 79 (1986).

3. Whether a prosecutor provides evidence of discrimination under Batson v. Kentucky, 476 U.S. 79 (1986), when she refuses to ask any voir dire questions of a black juror she has peremptorily challenged, stating for the record

she assumes the juror will not answer her questions truthfully.

In a per curiam opinion, the court below affirmed the trial court's denial of the Batson challenge as not clearly erroneous.

STATEMENT ON ORAL ARGUMENT

To provide all the members of the Court with an opportunity to have their questions about the issues raised here fully answered, oral argument is both necessary and appropriate.

STATEMENT ON PUBLICATION

Since the opinion here will provide guidance to trial courts on the proper resolution of the important constitutional issue of discriminatory peremptory strikes, the opinion should be published.

STATEMENT OF THE CASE

1.Nature of the Case

This is an appeal from Ms. Lamon's felony conviction for violating §943.32(1)(b)&(2), Stats.(Robbery by threat of force with Article reasonably believed to be Dangerous Weapon) and from the denial of her postconviction motion.

2. Proceedings Below

On June 3, 1998, complaint number 98-CF-1822 was filed in Rock County Circuit Court charging Ms. Lamon with violating §943.32(1)(b)&(2), Stats. (Armed Robbery by threat of force with Article reasonably believed to be Dangerous Weapon). (1). The complaint also alleged Ms. Lamon was a repeater as defined in §939.62(1)(c), Stats. (1:2). On June 5, 1998, Ms. Lamon appeared and a date for preliminary hearing was set. (3)(48). Preliminary hearing was held June 11, 1998 and appellant was bound over for trial. (5). An information making the identical charge as in the complaint was filed on

June 30, 1998. (6). On that date, Ms. Lamon stood mute and the court entered a not guilty plea for her. (7).

On July 24, 1998, the State filed a motion to consolidate Ms. Lamon's trial with other alleged participants in the same crime. (11). On August 12, 1998, trial counsel filed a written objection to the motion. (13).

On August 21, 1998, trial counsel filed a motion to dismiss for insufficiency of the evidence at prelim. (14). On September 3, 1998, the State filed a memorandum of law opposing the motion to dismiss. (16).

On September 10, 1998, the court issued its written order denying the State's motion for consolidation. (20). On October 7, 1998, the court issued its written order denying the motion to dismiss. (23).

On April 14, 1999, trial began with jury selection. (32)(35). The prosecutor used a peremptory challenge to strike the only black juror from the panel and trial counsel objected on constitutional grounds. (60:24). The trial court asked the prosecutor for an explanation and rejected counsel's objection. (60:24-30).

At the instruction conference, defense counsel asked for an instruction on theft from a person. (60:178). The prosecutor joined in the request. (60:181). The trial court refused the request. (60:181-182).

On April 15, 1999, the jury returned a verdict of guilty. (36)(38)(61:60).

On May 24, 1999, Ms. Lamon admitted the repeater allegation and the court sentenced her to 20 years in prison consecutive to the sentence she was already serving. (40)(45).

On March 21, 2000, the Court of Appeals dismissed a previous appeal to allow a postconviction motion to be heard. (63). The trial court denied the postconviction motion by written order on November 20, 2000. (71).

On April 4, 2002, the Court of Appeals affirmed in an unpublished, per curiam opinion. See Appendix.

3. Statement of Facts

a. The Offense

On the evening of May 30, 1998, Leeman Jones was at a party in Janesville drinking beer with friends. (60:97-98). About 1 am., he left the party to drive to his home in Beloit. (60:64, 98). At some point as he was traveling down 6th Street in Beloit, he saw a woman walk out into the street waving her arms. (60:67, 102-104). This woman was Ms. Lamon. (60:67-68).

Jones stopped his car. (60:67, 103). Ms. Lamon told him some people were trying to take her into an alley and kidnap her and asked him to take her to a telephone. (60:68, 105-106). Ms. Lamon got into Mr. Jones car. (60:68). Before Jones found a telephone, Ms. Lamon asked him to stop, saying a friend was in the car behind them. (60:73). He did so and the car behind stopped behind him. (60:73-75). A person got out of the car behind and began talking to Ms. Lamon. (60:75). The person was a black female. (60:76). This woman and Ms. Lamon conversed about how she had been babysitting Ms. Lamon's children and needed money for a pizza. (60:77).

The woman then came over to the driver's side of the car and spoke with Mr. Jones. (60:78). Mr. Jones felt a hard object he could not see in his right side. (60:79-80). At the same time, the woman outside his car demanded his wallet. (60:80). Mr. Jones gave her his wallet. (60:81). The woman took money out of his wallet and threw the wallet back into the car. (60:82). She told him to stay there until they were gone. (60:84). The woman and Ms. Lamon went to the car behind and got in it. (60:84-88). This car drove off. (60:88).

Mr. Jones went home and called police. (60:89). After interviewing Mr. Jones, the police returned and took him to a restaurant. (60:90). There he saw the car Ms. Lamon had gotten into and identified her. (60:91).

There was a small puncture in the shirt Mr. Jones wore that night. (60: 92-93). Jones testified he later developed a small bruise. (60:94-95). (He had previously testified he had no markings on his body. (60:119).) Some crumpled bills were found underneath the driver's seat of the car where Ms. Lamon was found. (60:153). No weapon was found. (60:165).

b. The Batson Hearing

The prosecutor used her first peremptory challenge to strike the only black person on the venire from the jury. (60:24) (in Appendix). Ms. Lamon is black. Id. The prosecutor never individually asked that juror any questions. (60:25). After the defense objection, the trial court asked the prosecutor for her reasons for the strike. Id.

The prosecutor stated the juror's last name is the same as a number of people who have been prosecuted for crimes in Beloit. She further said the juror's residence address was in a high crime area. (60:26). She presented an exhibit showing police contacts, but no arrests or convictions, with persons at the juror's address. Id. (This 16 page exhibit is attached to document (65).) She further noted the juror had written on his questionnaire his employment "varies." (60:26). She also claimed the juror's failure to raise his hand when she asked panel members about friends or relatives who had been convicted of crime or victims of crime showed the juror "was not being completely forthright and honest." (60:28). When the court asked why she did not ask the juror any individual questions about these matters, the prosecutor said "he likely wouldn't have responded forthrightly to any further voir dire." (60:30). She also said she didn't want to single him out. Id.

The trial court did not inquire further as to these reasons for the strike and found it was supported by "just cause." Id.

ARGUMENT

Introduction

Racial discrimination in the selection of juries is a long, shameful chapter in American legal history. Up until 1880, when such laws were invalidated in Strauder v. West Virginia, 100 U.S. 303 (1880), state legislatures were free to prohibit all blacks from any jury service. After Strauder, supra, prosecutors turned to the peremptory challenge to exclude blacks from jury service, see generally Jon M. Van Dyke, Jury Selection Procedures (1977) at 150-160, sometimes publicly announcing their plans to eliminate blacks from juries. Watkins v. State, 199 Ga. 81, 33 S.E.2d 325, 328 (1945). (For the history of the peremptory challenge in general, see Swain v. Alabama, 380 U.S. 202, 212-221, 85 S.Ct. 824 (1965).)

Eighty-five years after Strauder, the highest Court finally recognized discriminatory use of peremptory challenges violated basic Equal Protection. See Swain, supra. But the Swain Court required the accused to "show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." 380 U.S. at 227. This "crippling burden of proof" made "prosecutor's peremptory challenges . . . largely immune from constitutional scrutiny." Batson v. Kentucky, 476 U.S. 79, 92-93, 106 S.Ct. 1712 (1986). Finally, in the landmark Batson, supra, decision, the Court eliminated that burden and found accused citizens could object to a prosecutor's discriminatory use of peremptory challenges in their individual cases if they could demonstrate to the trial judge a discriminatory motive for the challenges. 476 U.S. at 95-98.

Since Batson, the Court has made its best effort to eliminate any kind of discrimination in jury selection in America. See Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991)(defendant need not be same race as stricken juror to raise Batson claim); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077 (1991)(Batson applies in civil cases); Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348 (1992)(Batson applies to strikes by defendants); J.E.B. v.

Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994)(Batson applies to sexually discriminatory peremptory challenges). Despite this historic trend toward equal opportunity for minorities wishing to serve on juries, discrimination "remains widespread." 476 U.S. at 101(conc. opn. per White, J.). See, e.g., David C. Baldus, et al., Use of Peremptory Challenges in Capital Murder Trials, 3 U. Pa. J. Const. Law 3, 121-130 (Feb. 2001); Michael Wiggins, Few Are Chosen, 85 ABA Journal 50 (Feb. 1999).

The Batson schema for eliminating this discrimination has been succinctly summarized by the Court:

> once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proven purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769 (1995).

All of the issues presented here deal with step three, which is the step in the analysis reviewing courts have given trial judges the least guidance. See, e.g., Tracy M. Choy, Branding Neutral Explanations Pretextual under Batson v. Kentucky, 48 Hastings L.J. 577, 578-579 (March 1997).

I. THE TRIAL COURT'S REJECTION OF MS. LAMON'S CHALLENGE UNDER BATSON V. KENTUCKY, 476 U.S. 79 (1986) IS NOT ENTITLED TO ANY DEFERENCE ON APPEAL SINCE THAT COURT HAD NO OPPORTUNITY TO JUDGE THE STRICKEN JUROR'S CREDIBILITY.

A. Additional Facts

During the Batson hearing, Ms. Lamon's trial counsel questioned the factual basis for the prosecutor's explanations for her peremptory challenge of the only black juror on the panel. (60:25-29)(in Appendix). The trial court noted the

prosecutor had not asked the stricken juror any individual questions. (60:25). Defense counsel asked the court to voir dire the juror on the prosecutor's reasons. (60:29). Instead, the court asked the prosecutor for the reason why she did not individually voir dire the juror. Id. When the prosecutor said, inter alia, "he likely wouldn't have responded forthrightly," the court sustained her peremptory challenge without further inquiry or proceedings. (60:30).

B. Discussion

The Batson court found that, like any other factual finding, a trial court's conclusion at step three on the issue of discriminatory use of peremptory challenges vel non should be given "great deference." 476 U.S. at 98, n.21. See discussion in Hernandez v. New York, 500 U.S. 352, 364-366, 111 S.Ct. 1859 (1991). The reason for this rule is the trial judge is in the best position to judge the credibility of the persons involved. Id. See Galarza v. Keane, 252 F.3d 630, 635 (2d Cir.2001)(deference given because the finding of discrimination vel non "turns largely on the judge's observations of the attorneys and prospective jurors and an evaluation of their credibility"); Caldwell v. Maloney, 159 F.3d 639, 649 (1st Cir.1998)(deference because "trial judge is in the best position to evaluate context, nuance and the demeanor of prospective jurors and the attorneys."); U.S. v. Johnson, 4 F.3d 904, 913 (10th Cir.1993)(trial court "is in the best position to observe the demeanor and credibility of the prosecutor and the witness[juror].").

So, the great deference rule is not applied where the trial judge has no opportunity to evaluate credibility. In Holder v. Welborn, 60 F.3d 383, 388 (7th Cir.1995), a magistrate presided over the Batson hearing long after the trial had taken place. The Seventh Circuit found the great deference rule could not be applied because the trial judge "did not have the opportunity to observe the demeanor of the members of the venire as they answered questions posed by the attorneys" or "to observe the responses from the venire and to hear the attorney's explanation for a peremptory . . ." Id. The Holder court reviewed the trial court's discrimination decision de novo. Id.

The reasoning of Holder, supra, applies with equal force here, where the trial judge never had the opportunity to evaluate the stricken juror's responses because the prosecutor refused to ask him any questions. The highest Court requires deference to state court factual findings "in the absence of exceptional circumstances . . ." Hernandez, supra, 500 U.S. at 366. If a trial judge has no opportunity to judge credibility, this is just such an exceptional circumstance. Holder, supra. This Court is therefore free to review the trial court's discrimination decision here de novo as in Holder.

II. THE PROCECUTOR'S REFUSAL TO ASK ANY VOIR DIRE QUESTIONS OF THE STRICKEN JUROR IS EVIDENCE OF DISCRIMINATION UNDER BATSON V. KENTUCKY, 476 U.S. 79 (1986).

The Batson rule provides "the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party." McCollum, supra, 505 U.S. at 59. See discussion of harmful stereotypes in Edmonson, supra, 500 U.S. at 630-631.

Neither step one nor step two of the Batson procedure for eliminating discriminatory use of peremptory challenges is at issue here. See Purkett, supra, 514 U.S. at 767, cited and quoted in the Introduction hereinabove. Since the trial judge here asked the prosecutor for her reasons for the strike and she provided them (60:25), the issue at step one of establishment of the prima facie case is moot. Hernandez, 500 U.S. at 359. (It should be noted, however, that since disparate impact alone may be sufficient to establish the prima facie case, 500 U.S. at 375 (conc.opn. per O'Connor, J.), and here the only black juror on the panel was stricken (60:24-25), the trial court could have properly found a prima facie case. Morse v. Hanks, 172 F.3d 983, 985 (7th Cir.1999)(prima facie case can be made out by striking sole black juror).) Since the prosecutor stated facially race-neutral reasons for her strike, see 514 U.S. at 768 (even "implausible or fantastic" reasons are not insufficient at step two as long as they are not inherently discriminatory), their sufficiency is not at issue.

At issue here is the way in which the trial judge makes the

ultimate decision on discrimination at step three of the Batson procedure. Beyond finding this is a totality of the circumstances test, 500 U.S. at 363 ("totality of the relevant facts"), id. at 364 ("trial judge can consider these and other factors"), the high Court has given trial judges little guidance. See also Coulter v. Gilmore, 155 F.3d 902, 920 (7th Cir.1998)("trial court must consider all relevant circumstances").

Lower courts have filled this gap by identifying nonexclusive lists of factors whose presence shows discrimination by the prosecutor. People v. Richie, 217 A.D.2d 84, 89, 635 N.Y.S.2d 263 (1995)(listing factors); State v. Gonzales, 206 Conn. 391, 399, 538 A.2d 210(1988)(same); Stanley v. State, 313 Md. 50, 78-79, 542 A.2d 1267(1988)(same); Keeton v. State, 749 S.W.2d 861, 866-869 (Tex.Crim.App.1988)(en banc)(same); State v. Slappy, 522 So.2d 18, 22 (Fla.1988)(same); State v. Antwine, 743 S.W.2d 51, 65 (Mo.1987)(same); Ex parte Branch, 526 So.2d 609, 621-625 (Ala.1987)(same). All of these courts include the prosecutor's failure to voir dire the stricken juror on the alleged reason for the strike as a circumstance showing discrimination.

This Court has also outlined a list of Batson factors. State v. Walker, 154 Wis.2d 158, 174-175, 453 N.W.2d 127 (1990), but it has yet to explicitly find these factors may be used at step three of the Batson procedure. Since the final determination of discrimination by the trial judge at step three is a totality of the circumstances test, 155 F.3d at 920, it seems clear the Walker factors may be used at step three.

Using these factors, reviewing courts do not hesitate to find a prosecutor's explanation for a strike to be a pretext for discrimination where she has failed to voir dire the stricken juror on the point. Ex parte Bird, 594 So.2d 676, 683 (Ala.1991)(failure to voir dire on "same name" basis for strike is evidence of discrimination); Esteves v. State, 859 S.W.2d 613 (Tex.App.1993)(where prosecutor claimed juror was member of accused's family but no voir dire on point, Batson challenge sustained); Washington v. Commonwealth, 34 S.W.2d 376, 378-380 (Ky.2000)(Batson challenge

sustained where no voir dire of stricken juror).

The reason for weighing the failure to voir dire the juror on the alleged race-neutral reason for the strike against the prosecution should be obvious. The inquiry at step three is directed to the "genuineness" of the reason for the strike. 514 U.S. at 769. If the facts are contrary to the asserted reason, this indicates the explanation is not genuine. The inference from such a failure to voir dire is the prosecutor either does not know the facts she states are true or she knows them to be untrue. So, "the failure to conduct voir dire must weigh against the state in an evaluation of the bona fides of the proffered reason." Mack v. State, 650 So.2d 1289, 1298 (Miss.2000). Furthermore, allowing prosecution strikes "based on nothing more than the juror's last name," without voir dire, "opens the door to a myriad of prosecutorial misconduct and essentially insulates such conduct from any meaningful review . . ." Ridley v. State, 235 Ga.App. 591, 593, 510 S.E.2d 113 (1998).

Here, the prosecutor's failure to voir dire the juror on any of her asserted race-neutral reasons for her strike weighs against the genuineness of her stated reasons. When defense counsel questioned the factual basis for the prosecutor's claim juror Bell was related to persons named Bell who had been prosecuted for crime (60:27), the prosecutor produced a list of police contacts at the residence the juror listed in his jury questionnaire. (This list is attached to record document 65.) But this list does not show any arrests or convictions of anyone. (Indeed, of the two incidents involving someone named Bell, the police themselves classified the first as "civil in nature" (65:25) and in the second the complaint was withdrawn when the property was recovered. (65:15).) Neither does it show juror Bell lived there during the time any of these incidents took place nor that he was related to anyone who lived there. Thus, there was no factual basis for the prosecutor's claim of relationship between juror Bell and persons named Bell who had been prosecuted for crime and the prosecutor did not question the juror about the matter because she did not want any testimony in the record showing her alleged race-neutral reason was not true. It seems clear here this Court should take an inference of discrimination

from the prosecutor's failure to voir dire on her "same name" hypothesis. Bird, supra; Ridley, supra.

III. THE PROSECUTOR'S FAILURE TO ASK ANY VOIR DIRE QUESTIONS OF THE STRICKEN BLACK JUROR, STATING FOR THE RECORD SHE ASSUMES THE JUROR WOULD NOT ANSWER TRUTHFULLY, WAS EVIDENCE OF DISCRIMINATION UNDER BATSON V. KENTUCKY, 476 U.S. 79 (1986).

Of course, this case is easier to decide than a reading of the previous two arguments would reveal. There is no need here to weigh potentially conflicting inferences from circumstantial evidence of discrimination. The prosecutor provided direct evidence of discrimination. Though she had asked the black juror no individual questions, she said, "I am concerned that he was not responding to the questions on voir dire and was not being completely forthright and honest." (60:28). When the court asked her "why you didn't make specific inquiry as to the juror as to some of these matters?" (60:29), the prosecutor responded "he likely wouldn't have responded forthrightly . . ." (60:30). In other words, the prosecutor believed the black juror would lie if asked any individual questions. Making up your mind about someone before examining the facts is the essence of prejudice so when the prosecutor prejudged the juror's credibility she provided the clearest possible evidence her strike was racially motivated. The Batson rule protects the juror, as well as the accused, from racial discrimination, 476 U.S. at 87; Powers, supra, 499 U.S. at 406-409 (discussing harm to jurors and concluding jurors have Equal Protection right not to be excluded on basis of race), and no juror of any race should have to sit still for a prosecutor prejudging his or her credibility.

By prejudging the juror's credibility, the prosecutor usurped the trial judge's function to consider all relevant circumstances at step three of the Batson procedure. Unfortunately, the judge here allowed this usurpation and dismissed Ms. Lamon's Batson challenge without conducting the voir dire requested of him by defense counsel. (60:29-30). It was clearly erroneous for the judge to abdicate his

responsibility in this manner.

Based on this obvious bias by the prosecutor, this Court should find the Batson challenge should have been sustained.

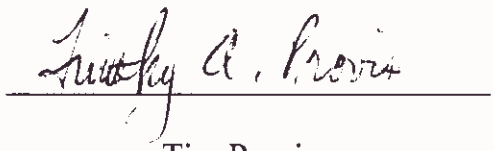
Conclusion

Batson prohibits peremptory challenges based on "the racial stereotypes held by the party." McCollum, supra, 500 U.S. at 59. Should the Court allow this strike to stand, it would be furthering the racial stereotype "Black people are liars." As the high Court has made clear, such stereotypes have no place in American courtrooms. Edmonson, supra, 500 U.S. at 630-631 (the price of race stereotypes "is too high to meet the standard of the Constitution." at 630.)

Batson error is not subject to the harmless error rule. Tankleff v. Senkowski, 135 F.3d 235, 248 (2d Cir.1998)(citing federal cases, including Rosa v. Peters, 36 F.3d 625, 634, n.17 (7th Cir.1994)); State v. McRae, 494 N.W.2d 252, 260 (Minn.1992)(en banc). Therefore, counsel respectfully submits the foregoing demonstrates the judgments below must be reversed and the case remanded for a new trial.

Dated: October 25, 2002

Respectfully submitted,



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APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

April 4, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3403-CR **Cir. Ct. No. 98-CF-1822**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

NANCY R. LAMON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Nancy Lamon appeals from a judgment of conviction and an order denying postconviction relief. The issues are whether the jury should have been instructed on an additional lesser-included offense, and whether the trial court erred by concluding that Lamon failed to prove that the prosecutor did not have a race-neutral reason to strike one juror. We affirm.

¶2 Lamon was charged with and convicted of armed robbery. At trial the jury was instructed on armed robbery and the lesser-included offense of robbery. In addition, Lamon requested an instruction on theft from a person, WIS. STAT. § 943.20(1) and (3)(d)2 (1999-2000),[1] which differs from robbery primarily by lacking the element of force. Lamon argues that the trial court erred by denying this request. The parties agree on the legal standard governing a court's decision to instruct on a lesser-included offense, and that our standard of review is de novo. *See* ***State v. Foster***, 191 Wis. 2d 14, 23, 528 N.W.2d 22 (Ct. App. 1995).

¶3 The victim testified that Lamon sat in the front seat of his car and held an object against his side while another person demanded his wallet, which he then surrendered. The trial court concluded that there was no reasonable basis for the jury to acquit on armed robbery and robbery, but then convict on the lesser-included offense of theft from a person. Lamon argues that the victim was not a credible witness for various reasons, and that the jury could therefore have disbelieved his testimony about the use of force during the incident. We disagree. We do not see a reasonable basis for the jury to conclude that the victim's testimony about the incident was generally truthful, except as to the use of force. If the jury had doubts about the victim's credibility, it might have disbelieved his entire story and acquitted Lamon, but there was no reason in the evidence for the jury to disbelieve only the part about the use of force.

¶4 Lamon also argues that the court erred by allowing the prosecutor to use a peremptory challenge to remove the only black person from the jury panel.

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[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

The parties agree that to establish this claim Lamon must first make a prima facie showing that the prosecutor exercised the strike on the basis of race; that if she does so, the burden shifts to the State to articulate a race-neutral explanation; and that the trial court then determines whether the defendant carried her burden of proving purposeful discrimination. *See* ***Hernandez v. New York***, 500 U.S. 352, 358-59 (1991). We review each of these determinations using the "clearly erroneous" standard. ***State v. Lopez***, 173 Wis. 2d 724, 729, 496 N.W.2d 617 (Ct. App. 1992).

¶5 Lamon raised this issue promptly after the State made the challenge. The trial court did not expressly rule on whether Lamon made a prima facie showing, but the court did ask the prosecutor why the strike was made. The prosecutor said that she struck the juror because he had the same last name as other people who have been prosecuted, his address is in a high-crime area, there have been numerous police contacts at his address, she believed he had not answered truthfully when she asked the full panel if any had had contact with law enforcement officers, and he indicated his employment "varies." After hearing further argument, the court concluded that the State had "just cause for the strike."

¶6 On appeal Lamon argues that the reasons offered by the prosecutor were not race-neutral. However, we conclude the court's ruling was not clearly erroneous. The prosecutor offered plausible reasons supporting her decision to strike that juror. It is true that the prosecutor might have been able to clarify her concerns by questioning the juror without striking him, but it was not clearly erroneous for the court to accept the prosecutor's explanation that she did not do that because she thought some of the juror's responses to questions to the full venire panel were not "completely forthright and honest," and that she did not want to single out this juror for further questioning.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

approach the bench?

THE COURT: I'll meet with counsel in chambers.

MS. DABSON BOLLENDORF: Do you want the defendant present, Judge?

MR. LIVINGSTON: I'll get her.

(In chambers - 9:46 a.m.)

THE COURT: Well, the record will show that we are in chambers. Counsel have requested to be heard outside of the presence of the jury. We were engaged in the process of striking the jury down to 12. The defendant is present with her counsel. Miss Bollendorf is present in behalf of the State. You requested to be heard in chambers. What's the problem, Mr. Livingston?

MR. LIVINGSTON: Your Honor, the first strike by the State was the only African American member of the panel. And I wish to have a Batson challenge to that, Your Honor. I note that the defendant is African American. The first strike was the only African American on the panel and I would also note that the victim in this case appears to be approximately the same age and similarly situated to the lone strike or to the strike of the State and that --

THE COURT: You're talking about Mr. Jones?

MR. LIVINGSTON: Bell. Donte Bell is his name.

MS. DABSON BOLLENDORF: The jurors' name.

THE COURT: I'm sorry?

MR. LIVINGSTON: Yes. Mr. Jones, the victim, is approximately the same age as Mr. Bell, the juror who was struck. And Mr. Bell, I also note, made no comments during voir dire.

THE COURT: Well, I think it's undisputed, Miss Bollendorf, the only black juror is the one in question. Is that right?

MS. DABSON BOLLENDORF: That is correct.

THE COURT: And as I recall you did not even ask him any individual questions. Do you have some reason for the strike?

MS. DABSON BOLLENDORF: Yes, Your Honor. As the court is probably well aware, our office as well as the federal prosecutor, has prosecuted a number of Bells who live in Beloit throughout the years. It's well known as a criminal name in Beloit. I would also note that the address that he lives at is 1216 Wisconsin Avenue which is a high crime area in Beloit. Um, I also yesterday had the Beloit Police Department run information on the 1216

Wisconsin address. There are numerous pages of police contacts there. Involving anything from civil processes to code violations to complaints of stolen vehicles. There was one complaint of a woman indicating that her husband had stolen her vehicle and had done so to support his drug habit. It may very well be and I believe that this Bell, Dondre Bell, is in fact related to those people that are at that address. He did not respond to any of the questions about having contact with our office or with law enforcement officers. Given the number of contacts at that residence, 1216 Wisconsin, that Mr. Bell resides at, that it's a high crime area and we have prosecuted a number of Bells in the past, the State believes that it is a reasonable strike under the circumstances. I can file with the court the list of contacts that the police department ran.

THE COURT: Do you want to mark this as an exhibit for the purpose of this proceeding, Madam Clerk?

MS. DABSON BOLLENDORF: I would also note that on Mr. Bell's juror card he indicates that his employment in the past 5 years he wrote down "varies" as the answer which I think also is applicable to the strike of Mr. Bell as to his

qualifications from the State's perspective of being a responsible juror.

THE COURT: Mr. Livingston?

MR. LIVINGSTON: Your Honor, regarding his name being Bell, Bell is a fairly common name. I believe there was voir dire on whether or not someone else's family members were -- had dealings with the District Attorney's Office and maybe even committed crimes. Mr. Bell did not raise his hand. Attorney Dabson Bollendorf could have asked him if he was related to that family. She chose not to. So we don't know if he is or not. Regarding the incidences at that address, I haven't seen the exhibit yet, but we don't know when those occurred and we don't know how long Mr. Bell has resided --

THE COURT: Well, the exhibit is being furnished to you by the clerk so you can examine it if you wish, counsel.

MR. LIVINGSTON: Your Honor, it appears that there was one incident in 1998 on a welfare check and then the most recent incident before that was February 11th of '97 for service of civil papers. Another incident in February, the day before, in 1997 appears to be the same incident and then incidences in 1996. We have no idea how long

Mr. Bell has resided at this address. Obviously the State had this information. Could have asked him about his residence. How long he had been there. If he had been involved in any of these incidences and chose not to. And so we don't know if he's been living at that address, you know, one month, two years, whatever. Also the 1216 Wisconsin is about four blocks from my house. Although I believe that is a high crime area. I would agree with that. That's all I have.

MS. DABSON BOLLENDORF: Your Honor, with regard to the exhibit, I would note that if you page through the exhibit, Mr. Livingston simply looked at the first page. It does indicate contacts with people by the name of Bell at that address throughout the exhibit. So it's clear that the Bell family has resided there for a lengthy period of time. And presumably including Mr. Dondre Bell who is the prospective juror or certainly he is related to the Bells that are residing there. I am concerned that he was not responding to the questions on voir dire and was not being completely forthright and honest.

THE COURT: Specifically what questions are you referring to, counsel?

MS. DABSON BOLLENDORF: If any relative or close friend has been convicted of a crime. Or been a victim of a crime. Particularly I believe one of the car incidents where -- I'd have to look at it to get the names right, but a Mrs. Bell reported that her husband stole the car for purposes of supporting his drug habit. I believe that was a '96 or '98 incident. And that was obviously a Bell family member. Which would constitute being a victim of a crime and certainly perhaps being convicted. But it certainly ties the Bell family to that residence for a lengthy period of time and certainly with police contacts there.

THE COURT: And anything further, Mr. Livingston?

MR. LIVINGSTON: Your Honor, all these questions could have been asked Mr. Bell during voir dire. The court is considering disqualifying him or allowing the preemptive strike of the lone African American juror. I would ask prior to doing that the court individually voir dire Mr. Bell.

THE COURT: Any particular reason, Mrs. Bollendorf, why you didn't make specific inquiry as to the juror as to some of these matters?

MS. DABSON BOLLENDORF: I felt that the

exhibit which is, I believe, Exhibit 1 pretty much spoke for itself. Given that Mr. Bell was not responding to my questions regarding whether a family member or close friend had been the victim of a crime or convicted of a crime or had contact with the District Attorney's Office, that he likely wouldn't have responded forthrightly with regard to any further voir dire. I also did not want to appear as though I was singling him out under the circumstances.

THE COURT: Well, I think the State has made its case and it does have just cause for the strike. You have exception to the court's ruling. Let's proceed and we'll proceed to draw the jury.

MS. DABSON BOLLENDORF: Your Honor, before we swear the jury I do need to check on the status of the victim. I did get a note from our victim witness person that he was ill this morning. Was having a hard time breathing and talking. I don't know if it's cold related or what the problem is, but I think I do need to check on the status before we proceed.

THE COURT: All right. We won't impanel the jury until you have had an opportunity to -- do you think there is some possibility he may be

TO: Ms. Marilyn Graves
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

FR: Judi Farmer
Court Services Supervisor
51 S. Main St.
Janesville, WI 53545

RE: State of Wisconsin vs Nancy R. Lamon
98CF1822 99-2735-CR

1.	1-4	Criminal Complaint filed 6-3-98
2.	1-1	Minutes of 6-3-98 proceeding
3.	1-1	Minutes of 6-5-98 proceeding
4.	1-1	Bond and Conditions of Bond filed 6-5-98
5.	1-1	Minutes of 6-11-98 proceeding
6.	1-1	Information filed 6-30-98
7.	1-1	Minutes of 6-30-98 proceeding
8.	1-1	Minutes of 7-13-98 proceeding
9.	1-1	Minutes of 7-27-98 proceeding
10.	1-1	State's Demand for Discovery filed 7-24-98
11.	1-2	Notice of Motion and Motion for Joinder filed 7-24-98
12.	1-1	Minutes of 8-10-98 proceeding
13.	1-2	Response to Motion for Joinder file 8-12-98
14.	1-3	Defendant's Motion to Dismiss, Affidavit of Jeffrey E. Livingston dated 8-21-98
15.	1-1	Minutes of 8-24-98 proceeding
16.	1-4	State's Response to Motion to Dismiss filed 9-3-98
17.	1-1	Minutes of 9-8-98 proceeding
18.	1-1	Request for Substitution of Judge filed 9-8-98
19.	1-1	Minutes of 9-10-98 proceeding
20.	1-2	Order Denying Request for Consolidation filed 9-10-98
21.	1-1	Minutes of 9-14-98 proceeding
22.	1-1	Minutes of 10-6-98 proceeding
23.	1-1	Order filed 10-7-98
24.	1-1	Minutes of 10-26-98 proceeding
25.	1-1	Response to State's Demand for Discovery filed 11-4-98
26.	1-1	Minutes of 1-27-99 proceeding
27.	1-1	Supplemental Response to State's Demand for Discovery filed 1-29-99
28.	1-1	Minutes of 2-8-99 proceeding
29.	1-1	Minutes of 4-12-99 proceeding
30.	1-1	Exhibit List filed 4-15-99
31.	1-1	Envelope containing exhibits # 1, 3, 5, 6, and 7 from 4-14-99 proceeding
32.	1-1	Juror's Selection and Peremptory Challenges filed 4-15-99

33.	1-3	Affidavit of Jeffrey E. Livingston filed 4-15-99
34.	1-2	Motion in Limine filed 4-15-99
35.	1-2A	Minutes of 4-14-99 proceeding
36.	1-1A	Minutes of 4-15-99 proceeding
37.	1-25	Jury Instructions filed 4-15-99
38.	1-1	Verdict filed 4-15-99
39.	1-1	Pre-Sentence Investigation Report dated 5-11-99
40.	1-1	Minutes of 5-24-99 proceeding
41.	1-1	Your Appeal and Post-Conviction Rights filed 5-24-99
42.	1-1	Notice of Intent to Pursue Postconviction Relief filed 5-26-99
43.	1-3	Request for Court Record filed 5-24-99
44.	1-1	Letter from State Public Defender's Office dated 7-9-99 filed 7-12-99
45.	1-1	Judgment of Conviction - Sentence to Wisconsin State Prisons filed 5-26-99
46.	1-1	Notice of Appeal filed 10-19-99
47.	1-4	Transcript of 6-3-98 proceeding filed 7-14-99
48.	1-7	Transcript of 6-5-98 proceeding filed 7-1-99
49.	1-4	Transcript of 7-13-98 proceeding - Status Call filed 9-3-99
50.	1-4	Transcript of 7-27-98 proceeding filed 8-25-99
51.	1-5	Transcript of 8-24-98 proceeding - Motion Hearing filed 9-3-99
52.	1-4	Transcript of 9-8-98 proceeding filed 8-25-99
53.	1-5	Transcript of 9-14-98 proceeding - Status Call filed 9-3-99
54.	1-8	Transcript of 10-6-98 proceeding filed 8-25-99
55.	1-269	Transcript of 10-14-98 proceeding - Jury Trial filed 11-20-98
56.	1-3	Transcript of 10-26-98 proceeding filed 8-25-99
57.	1-7	Transcript of 1-27-99 proceeding - Motion Hearing filed 9-3-99
58.	1-5	Transcript of 2-8-99 proceeding - Calendar Call filed 9-3-99
59.	1-3	Transcript of 4-12-99 proceeding - Calendar Call filed 9-3-99
60.	1-188	Transcript of 4-14-99 proceeding - Jury Trial Day 1 filed 8-23-99
61.	1-67	Transcript of 4-15-99 proceeding - Jury Trial Day 2 filed 8-23-99
62.	1-28	Transcript of 5-24-99 proceeding - Sentencing Hearing filed 9-3-99

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TO: Ms. Marilyn Graves
Clerk of Court of Appeals
P.O. Box 1688
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FR: Judi Farmer
Court Services Supervisor
51 S. Main St.
Janesville, WI 53545

RE: State of Wisconsin vs Nancy R. Lamon
98CF1822 00-3403

Following is a listing of documents that constitute the **2ND** appeal record.

63.	1-1	Order from the Court of Appeals dated 3-21-00 filed 3-22-00
63A.	1-31	Postconviction Motion for New Trial filed 11-17-00
64.	1-1	Minutes of 7-10-00 proceeding
65.	1-25	State's Response to Motion for New Trial filed 7-28-00
66.	1-1	Blank page, was a duplicate of #67
67.	1-3	Defendant's Reply to State's Response filed 8-14-00
68.	1-1	Minutes of 8-21-00 proceeding
69.	1-2	Defendant's supplemental Brief filed 9-7-00
70.	1-2	State's Reply to Defendant's Supplemental Brief filed 9-21-00
71.	1-3	Order Denying Post-Conviction Motion for New Trial filed 11-20-00
72.	1-1	Notice of Appeal filed 12-6-00

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

☐ Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.

☒ Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 3,909 words.

Dated: 10/25/02.

Signed,

Timothy A. Provis

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October 26, 2002

Cornelia G. Clark
Clerk
Supreme Court of Wisconsin
P.O. Box 1688
Madison, Wisconsin 53701

Dear Court and Counsel,

Re: State v. Lamon, No. 00-3403-CR Errata in Appellant's Brief

On page 9 of Appellant's Brief, the argument heading should, of course, read "THE PROSECUTOR'S REFUSAL . . ." Please accept my apologies for any inconvenience the error may have caused.

Sincerely yours,

Timothy A. Provis

Tim Provis
Appellate Counsel
Wis. Bar No. 1020123
Cal. Bar No. 104800

STATE OF WISCONSIN

IN SUPREME COURT

No. 00-3403-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NANCY R. LAMON,

Defendant-Appellant-Petitioner.

ON REVIEW OF THE DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE EDWIN C. DAHLBERG PRESIDING, AND THE ORDER DENYING POSTCONVICTION RELIEF ALSO ENTERED IN THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE DANIEL T. DILLON, PRESIDING

BRIEF AND APPENDIX OF RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

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STATE OF WISCONSIN,

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v.

NANCY R. LAMON,

Defendant-Appellant-Petitioner.

ON REVIEW OF THE DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE EDWIN C. DAHLBERG PRESIDING, AND THE ORDER DENYING POSTCONVICTION RELIEF ALSO ENTERED IN THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE DANIEL T. DILLON, PRESIDING

BRIEF OF RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-respondent, the State of Wisconsin, requests oral argument and publication of this Court's opinion.

SUPPLEMENTAL STATEMENT OF THE CASE

Defendant-appellant-petitioner Nancy R. Lamon stood trial in Rock County Circuit Court for robbery as party to the crime (6). Judge Edwin C. Dahlberg presided over Ms. Lamon's jury trial.

Dondre Bell was a member of the venire panel from which Lamon's jury was selected (32:1).

Assistant District Attorney Jodi Dabson Bollendorf asked during voir dire whether any of the panel members had ever been the victim of a crime, or had had contact with the Rock County District Attorney's Office in any capacity (60:11). She also asked whether any of the panel members had a close relative or friend who had been the victim of a crime (60:15) or had been convicted of a crime (60:18).

Assistant District Attorney Bollendorf directed individual follow-up questions to panel members who responded to her general inquiries. Bell did not respond to any of those general inquiries, and was asked no individual follow-up questions (60:11-18).

Assistant District Attorney Bollendorf exercised the state's first peremptory strike against Bell (32:1).

Defense counsel Jeffrey Livingston asked to be heard in chambers. There, Attorney Livingston raised a *Batson*[1] challenge on grounds that Bell was the only African-American member of the venire panel. Attorney Livingston noted that the robbery victim, Leeman Jones, appeared to be approximately the same age and similarly situated to Bell (60:24; P-Ap. 5). Attorney Livingston also noted that Bell had made no comments during voir dire (60:25; P-Ap. 6).

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[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Judge Dahlberg and Assistant District Attorney Bollendorf agreed that Bell was the only African-American panel member. Without making any prima facie determination of discriminatory intent, Judge Dahlberg asked Assistant District Attorney Bollendorf her reason for striking Bell (60:25; P-Ap. 6).

Assistant District Attorney Bollendorf replied that her office and the federal prosecutor had prosecuted a number of Bells living in Beloit. She added that Bell was well known as a criminal name in Beloit (60:25; P-Ap. 6).

Assistant District Attorney Bollendorf explained that Dondre Bell lived at 1216 Wisconsin Avenue, a high crime area of Beloit. A Beloit Police Department inquiry, proffered by Assistant District Attorney Bollendorf, had disclosed numerous pages of police contacts at that address. Those contacts ranged from civil process to stolen vehicle complaints, including one woman's complaint that her husband had stolen her vehicle to support his drug habit. Assistant District Attorney Bollendorf indicated her belief that Bell well might be related to the people at the Wisconsin Avenue address. She noted that Bell had not responded to any of the voir dire questions about contact with the district attorney's office or law enforcement (60:25-26; P-Ap. 6-7).

Assistant District Attorney Bollendorf further explained that Bell had indicated on his juror card that his employment for the past five years "varies" (60:26; P-Ap. 7). She explained that answer also affected the state's view of Bell's qualification as a responsible juror (60:26-27; P-Ap. 7-8).

Judge Dahlberg asked for Attorney Livingston's response. Attorney Livingston indicated that Bell was a fairly common name. Attorney Livingston indicated his belief that there had been voir dire on whether or not someone else's family members had had dealings with the district attorney's office or had committed crimes. He acknowledged that Bell had not raised his hand, but

argued that Assistant District Attorney Bollendorf could have asked Bell if he was related to the criminal Bell family. Because Assistant District Attorney Bollendorf had not asked, Attorney Livingston continued, it was not known whether Bell was related (60:27; P-Ap. 8).

Attorney Livingston also argued that it was not known how long Bell had lived at the Wisconsin Avenue address. Again, he argued, the state could have asked how long Bell had lived there or whether he had been involved in any of the police contacts at that address. Attorney Livingston agreed that the neighborhood was a high crime area (60:27-28; P-Ap. 8-9).

Assistant District Attorney Bollendorf pointed out contacts with people named Bell listed throughout the police report, indicating that the Bell family had lived at the Wisconsin Avenue address for a lengthy period of time. Presumably that included Bell, she indicated, or his relatives (60:28; P-Ap. 9).

Assistant District Attorney Bollendorf also explained that she was concerned about Bell's lack of response to the voir dire questions about whether a relative or close friend had been convicted of a crime or the victim of a crime. She particularly noted the report of a Mrs. Bell that her husband had stolen the car to support his drug habit. Assistant District Attorney Bollendorf expressed concern that Bell was not being completely forthright and honest (60:28-29; P-Ap. 9-10).

Attorney Livingston argued that Assistant District Attorney Bollendorf could have questioned Bell about those matters during voir dire, and could have asked for individual voir dire (60:29; P-Ap. 10).

When Judge Dahlberg asked why Assistant District Attorney Bollendorf had not posed specific questions to Bell, she explained that the police report spoke for itself. She also explained that Bell's lack of response to her questions suggested that he wouldn't have responded

forthrightly to any further voir dire. Under the circumstances, Assistant District Attorney Bollendorf explained, she did not want to appear to single out Bell (60:29-30; P-Ap. 10-11).

Judge Dahlberg then concluded that "I think the State has made its case and it does have just cause for the strike" (60:30; P-Ap. 11). Before reaching that summary conclusion, Judge Dahlberg did not expressly confirm that Assistant District Attorney Bollendorf had proffered race-neutral explanations for striking Bell.

Ms. Lamon's postconviction motion again raised her *Batson* claim (63A:1-4). Judge Daniel Dillon denied the motion in a written order entered November 20, 2000 (71; R-Ap. 117-19).

Judge Dillon acknowledged that the prosecution had identified several reasons for striking Bell. In addition to Bell's last name, Judge Dillon reasoned, the prosecution was aware of numerous police contacts at Bell's address. He specifically noted reports of stolen items at the address, and Bell's lack of response to voir dire questions about relatives or friends who had been crime victims. Judge Dillon concluded that Assistant District Attorney Bollendorf had reason to strike Bell at that point, given her knowledge of police reports—involving persons named Bell—regarding thefts at Bell's address. Judge Dillon found that it was reasonable for Assistant District Attorney Bollendorf to conclude that Bell was being less than candid in not mentioning those contacts (71:1-2; R-Ap. 117-18).

Judge Dillon also rejected Ms. Lamon's argument that Assistant District Attorney Bollendorf had a burden to ask further questions of Bell in front of the entire venire. The police contacts at Bell's home, Judge Dillon explained, were sufficient for the state to strike Bell without "making further personal questions about his home and family the focal point of voir dire" (71:2-3; R-Ap. 118-19). Assistant District Attorney Bollendorf's

possession, at voir dire, of a computer printout of police contacts at Bell's home indicated that she had done her homework (71:3; R-Ap. 119).

Judge Dillon explained that Assistant District Attorney Bollendorf's suspicion that Bell had evaded answering the question about knowing crime victims was a clear, reasonable and legitimate race-neutral explanation for the peremptory strike. "A prosecutor who believes that a potential juror is less than candid on voir dire has the right to strike the juror on a peremptory strike, regardless of race" (71:3; R-Ap. 119).

The court of appeals also rejected Ms. Lamon's *Batson* claim, in a succinct *per curiam* decision:

> On appeal Lamon argues that the reasons offered by the prosecutor were not race-neutral. However, we conclude the court's ruling was not clearly erroneous. The prosecutor offered plausible reasons supporting her decision to strike that juror. It is true that the prosecutor might have been able to clarify her concerns by questioning the juror without striking him, but it was not clearly erroneous for the court to accept the prosecutor's explanation that she did not do that because she thought some of the juror's responses to questions to the full venire panel were not "completely forthright and honest," and that she did not want to single out this juror for further questioning.

State v. Nancy R. Lamon, No. 00-3403-CR (Wis. Ct. App. Apr. 4, 2002), slip op. at ¶6 (P-Ap. 3).

SUMMARY OF ARGUMENT

A peremptory strike that purposefully discriminates on the basis of race violates the Equal Protection Clause. *Batson* and its progeny teach how to balance competing jury selection fairness concerns implicated by peremptory strikes: assuring the parties that jurors will try a case on

the evidence placed before them and avoiding invidious, racially discriminatory government action.

Batson provides a three-step test for assessing a peremptory strike alleged to purposefully discriminate. The opponent of the strike must establish a prima facie case of purposeful discrimination. The proponent of the strike then must respond with a facially neutral explanation: an explanation based on something other than the struck venireperson's race. In the third step, with which this case is concerned, the trial court must determine whether the opponent has established the existence of purposeful discrimination.

Intent to discriminate presents a question of pure historical fact, turning largely on the trial court's assessment of the proponent's credibility. The trial court's conclusion on the third-step issue of purposeful discrimination is reviewable only for clear error.

The trial court must consider the totality of circumstances in determining whether the opponent has established purposeful discrimination. Intent to discriminate must be proved, not just assumed. Controlling case law provides adequate guidance for assessing that proof, as numerous Wisconsin decisions attest. Further procedural requirements are not needed.

As now framed by Ms. Lamon's brief-in-chief, this case concerns only whether a prosecutor must individually question a non-responsive venireperson before exercising a peremptory strike and the permissible conclusions a prosecutor may draw from a venireperson's apparent lack of candor concerning general voir dire questions. It does not concern using neighborhood of residence or other allegedly discriminatory "surrogates" to justify a peremptory strike.

Alleging purposeful discrimination in the state's peremptory strike of Dondre Bell, Ms. Lamon relies only on Assistant District Attorney Bollendorf's decision not to

pose individual questions to Bell and Assistant District Attorney Bollendorf's assumption that Bell would not be candid if questioned individually. Ms. Lamon neglects the remaining—and relevant—totality of circumstances.

Assistant District Attorney Bollendorf possessed a police report of contacts at Bell's residence in a high crime area, recognized "Bell" to be a well-known criminal name in Beloit, and noticed that Bell had not responded to any of her general questions about personal or family contact with the district attorney's office or law enforcement. Assistant District Attorney Bollendorf therefore believed that Bell was not being candid in response to her general questions. She also indicated that information on Bell's juror card that his employment for the past five years "varies" affected her view of Bell as a responsible juror. As for why she had not asked Bell any individualized questions, Assistant District Attorney Bollendorf explained that she did not want to single out the only African-American venireperson and that the police report spoke for itself.

Having observed both Assistant District Attorney Bollendorf and Bell during voir dire, and having heard Assistant District Attorney Bollendorf's explanation, the trial court concluded that the state had made its case for striking Bell. Implicit in that conclusion is the trial court's finding that Assistant District Attorney Bollendorf's explanation was credible.

Based on the totality of circumstances presented by the record of this case, the trial court's conclusion is not clearly erroneous. Controlling case law requires this court to affirm the trial court's factual finding of no purposeful discrimination, and to affirm Ms. Lamon's conviction.

ARGUMENT

THE TRIAL COURT'S FINDING THAT THE PROSECUTOR'S PEREMPTORY STRIKE OF AFRICAN-AMERICAN VENIRE-PERSON DONDRE BELL DID NOT VIOLATE *BATSON* WAS NOT CLEARLY ERRONEOUS.

Ms. Lamon's *Batson* claim concerns contemporary practice of an ancient tradition: the peremptory strike. Although equal protection jurisprudence now prohibits purposeful discrimination on the basis of race, ethnicity or gender, it has not otherwise altered the fundamentally wide-ranging and intuitive nature of permissible peremptory strikes. Before turning to the specifics of Ms. Lamon's claim, the state therefore offers the following summary of *Batson*, its antecedents, and its progeny.

A. Evolution of the peremptory strike through *Batson* and beyond.

Although not constitutionally required, the peremptory strike often is considered one of the most important rights possessed by a criminal defendant. It serves to eliminate extremes of partiality on both sides. It also serves to assure both parties that jurors will decide a case on the basis of the evidence presented. *Swain v. Alabama*, 380 U.S. 202, 219 (1965).

The peremptory strike originated centuries ago in English common law. *Swain*, 380 U.S. at 212-16. Historically, "the essential nature of the peremptory challenge [was] that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U.S. at 220.

Following the Civil War, the Supreme Court held that the Equal Protection Clause of the newly enacted Fourteenth Amendment prohibited state jury selection statutes that purposefully discriminated on the basis of race. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).[2] That holding was limited to a criminal defendant's right to a jury chosen from a jury pool selected without discrimination against members of the defendant's own race.

"[P]urposeful discrimination may not be assumed or merely asserted," the Court subsequently explained in another venire selection case. *Swain*, 380 U.S. at 205. Purposeful discrimination had to be proven, and the quantum of proof required was a matter of federal law. *Id.* An imperfect system did not equate purposeful discrimination. *Swain*, 380 U.S. at 209.

Swain also held that the Equal Protection Clause did not prohibit race-based peremptory strikes. The Court explained that subjecting a prosecutor's peremptory challenge to the Equal Protection Clause would radically alter the traditional unfettered nature of peremptory strikes. *Swain*, 380 U.S. at 221-22. The traditional practice, as the Court characterized it, allowed "striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes." *Swain*, 380 U.S. at 212. The Constitution simply did not require examining a prosecutor's reasons for a peremptory strike, the Court concluded. *Swain*, 380 U.S. at 222.

Batson subsequently wrought the radical alteration postponed in *Swain*, holding a prosecutor's exercise of peremptory strikes against individual venirepersons was

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[2]Ms. Lamon has not alleged violation of the Wisconsin Constitution. Had she done so, it would not affect the outcome of this case. The equal protection clause of the Wisconsin Constitution – Article I, sec. 1 – is the substantial equivalent of its counterpart in the Fourteenth Amendment to the United States Constitution. *Reginald D. v. State*, 193 Wis. 2d 299, 307, 533 N.W.2d 191 (1995).

indeed subject to the Equal Protection Clause. *Batson*, 476 U.S. at 89. Although reaffirming the prosecutor's general right to exercise peremptory strikes for any reason related to the prosecutor's view of case outcome, the Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors *solely* on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* (emphasis added).

Drawing from its venire selection cases, the Court explained that the "'invidious quality'" of government action alleged to be racially discriminatory in violation of the Equal Protection Clause "'must ultimately be traced to a racially discriminatory purpose.'" *Batson*, 476 U.S. at 93, quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976). Adapting standards developed in its venire selection and Title VII cases, the Court then announced a three-part test for assessing allegations of racially discriminatory peremptory strikes.

First, in order to establish a prima facie case of discriminatory intent, a defendant must show that: (1) he or she is a member of a cognizable group and that the prosecutor has exercised peremptory strikes to remove members of the defendant's race from the venire; and (2) the facts and relevant circumstances raise an inference that the prosecutor used peremptory strikes to exclude venirepersons on account of their race. *Batson*, 476 U.S. at 96. The trial court must consider all relevant circumstances in determining whether a defendant made the requisite showing. Those circumstances include any pattern of strikes against jurors of the defendant's race and the prosecutor's voir dire questions and statements. The Court expressed "confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Batson*, 476 U.S. at 97.

Second, if the trial court finds that the defendant has established a prima facie case, "the burden shifts to the State to come forward with a neutral explanation for challenging [the venireperson]." *Batson*, 476 U.S. at 97. The prosecutor's explanation must be clear, reasonably specific, and related to the case at hand. *Batson*, 476 U.S. at 98 and n.20. The prosecutor's explanation need not rise to the level justifying exercise of a strike for cause, however. *Batson*, 476 U.S. at 97-98

Third, when the prosecutor proffers a race-neutral explanation, the defendant then has the ultimate burden of persuading the court that the prosecutor purposefully discriminated or that the prosecutor's explanations were a pretext for intentional discrimination. *Batson*, 476 U.S. at 94 n.18, 98.

Following *Batson*, the Court expanded application of the three-part test to other proceedings and parties. It also further articulated applicable principles.

The Court held that the Equal Protection Clause authorized a criminal defendant to object to race-based peremptory strikes against venirepersons of races other than that of the defendant. *Powers v. Ohio*, 499 U.S. 400, 402 (1991). The Court held that the Equal Protection Clause prohibited race-based peremptory strikes in civil cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616 (1991). The Court held that the Equal Protection Clause prohibits a criminal defendant from race-based purposeful discrimination in exercising his or her peremptory strikes. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992). The Court held that the Equal Protection Clause prohibited peremptory strikes based on ethnicity. *Hernandez v. New York,* 500 U.S. 352, 355 (1991). The Court eventually held that the Equal Protection Clause also prohibited gender-based purposeful discrimination in the exercise of peremptory strikes. *J.E.B. v. Alabama*, 511 U.S. 127, 128-29 (1994).

Even so, the Court explained in *J.E.B.*, "[p]arties still may remove jurors who they feel might be less acceptable than others on the panel"—just so gender did not serve as a proxy for bias. *J.E.B.*, 511 U.S. at 143. Parties still could use peremptory strikes to remove any class of persons normally subject to rational basis review. And, absent a showing of pretext, strikes based on characteristics disproportionately associated with one gender were permissible. *Id.*

The same principles apply to race and ethnicity.

Official action does not violate the Equal Protection Clause simply because it results in a racially discriminatory impact. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. "Discriminatory purpose [] implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker [] selected [] a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Hernandez* 500 U.S. at 360 (internal citations and quotations omitted).

At the second *Batson* step, a "neutral explanation" means an explanation based on something other than the race of the juror. Facial validity of the prosecutor's explanation is the issue. Unless discriminatory intent is inherent in the prosecutor's explanation, "the reason offered will be deemed face neutral." *Hernandez*, 500 U.S. at 360; *see also United States v. Canoy*, 38 F.3d 893, 898 (7th Cir. 1994). Unless the prosecutor exercised a peremptory strike with the intent of causing disparate impact, that impact itself does not violate the principle of race neutrality. *Hernandez*, 500 U.S. at 362. In fact, the explanation proffered at the second step need not be "persuasive or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

Purkett clarified *Batson*'s call for a clear and reasonably specific explanation of legitimate reasons,

related to the particular case, for exercising a challenged peremptory strike. "This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett*, 514 U.S. at 768-69. Even a "silly" or "superstitious" reason, if facially nondiscriminatory, satisfies the second step. *Purkett*, 514 U.S. at 768.

It is not until the third step that persuasiveness and plausibility become relevant. Then, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U.S. at 768.

Wisconsin law fully incorporates *Batson* principles and analysis. *E.g.*, *State v. Davidson,* 166 Wis. 2d 35, 479 N.W.2d 181 (Ct. App. 1991); *State v. Gregory*, 2001 WI App 107, 244 Wis. 2d 65, 630 N.W.2d 711; *State v. Guerra-Reyna*, 201 Wis. 2d 751, 549 N.W.2d 779 (Ct. App. 1996); *State v. Jagodinsky*, 209 Wis. 2d 577, 563 N.W.2d 188 (Ct. App. 1997); *State v. King*, 215 Wis. 2d 295, 572 N.W.2d 530 (Ct. App. 1997); *State v. Lopez*, 173 Wis. 2d 724, 496 N.W.2d 617 (Ct. App. 1992); *State v. Walker*, 154 Wis. 2d 158, 453 N.W.2d 127 (1990).

B. This case concerns only Ms. Lamon's failure to prove purposeful discrimination in the third step of the *Batson* test.

Ms. Lamon indicates that all issues presented for this Court's review concern the third step of the *Batson* test (brief-in-chief at 7, 9). Although not conceding the adequacy of Ms. Lamon's prima facie showing, the state

acknowledges that the first step of the *Batson* test—the defendant's prima facie showing—becomes moot when the prosecutor offers a race-neutral explanation and the trial court rules on the ultimate question of intentional discrimination. *Hernandez*, 500 U.S. at 359; *King*, 215 Wis. 2d at 303. Given the absence of any facial reference to race in Assistant District Attorney Bollendorf's explanation for striking Bell, Ms. Lamon wisely refrains from arguing about the second step of the *Batson* test (brief-in-chief at 9). *Cf. Hernandez*, 500 U.S. at 360; *Canoy*, 38 F.3d at 898.

This case, consequently, concerns only the ultimate issue of purposeful discrimination. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768. Ms. Lamon therefore bears the burden of proving purposeful discrimination. As explained below, she fails to carry that burden.

C. The "clearly erroneous" standard of review governs the trial court's factual finding regarding purposeful discrimination.

Before addressing the merits of her *Batson* claim, Ms. Lamon argues that a *de novo* standard of review should apply (brief-in-chief at 7-9). The Supreme Court, however, has unequivocally established "clearly erroneous" as the standard of review applicable at the third step of the *Batson* test. Existing Wisconsin case law concurs, as does that of the Seventh Circuit and other jurisdictions.

In *Batson*, the Court cited a recent Title VII sex discrimination case in which it had characterized a finding of intentional discrimination as "'a finding of fact'" entitled to deference by a reviewing court. *Batson*, 476 U.S. at 98 n.21, quoting *Anderson v. Bessemer City*, 470

U.S. 564, 573 (1985). "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility," the Court explained, "a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n.21.

The Court subsequently referenced its *Batson* footnote in *Hernandez*, again characterizing the trial court's decision on the ultimate question of discriminatory intent as a finding of fact. *Hernandez*, 500 U.S. at 364, quoting *Batson*, 476 U.S. at 98 n.21. Elaborating on its rationale, the Court explained that

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because as we noted in *Batson*, the finding "largely will turn on evaluation of credibility." In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There seldom will be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."

Hernandez, 500 U.S. at 365 (internal citations omitted). An issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question, the Court concluded. *Hernandez*, 500 U.S. at 366.

Wisconsin law is in accord, holding that discriminatory intent is a question of historical fact and the clearly erroneous standard of review applies at each step of the *Batson* analysis. *Gregory*, 244 Wis. 2d 65, ¶5; *Lopez*, 173 Wis. 2d at 729. *Cf. State v. Jimmie R.R.*, 232 Wis. 2d 138, 148, 606 N.W.2d 196 (Ct. App. 1999) (trial courts are in a superior position to determine subjective bias of jurors because "they are able to assess the

demeanor and disposition of prospective jurors—through nonverbal signals that do not appear in a written record").

So is the Seventh Circuit. *See, e.g., United States v. Hughes*, 970 F.2d 227, 230 (7th Cir. 1992).

So are other jurisdictions. The Colorado Court of Appeals quoted a trial judge who aptly summarized the rationale for a deferential standard of review:

> "I don't think a case goes by where I don't perceive certain subjective human-to-human interactions between the jurors and all counsel such that I might make a note to myself [that] that person's going to get excluded because there was simply not a good connection there or that person is going to get excused by the other side because there was a particularly good connection made. So we're dealing in an area here of credibility, subtlety, subjectivity, [as well as] objective data."

People v. Hughes, 946 P.2d 509, 518 (Colo. Ct. App. 1997).

Ms. Lamon nonetheless argues that the trial court's rejection of her *Batson* claim is entitled to no deference on appeal. There are several problems with her argument.

First and foremost, *Hernandez* expressly rejected the notion of independent appellate review.

> We have difficulty understanding the nature of the review petitioner would have us conduct. Petitioner explains that "[i]ndependent review requires the appellate court to accept the findings of historical fact and credibility of the lower court unless they are clearly erroneous. Then, based on these facts, the appellate court independently determines whether there has been discrimination." But if an appellate court accepts a trial court's finding that a prosecutor's race neutral explanation for his peremptory challenges should be believed, we fail to see how the appellate court nevertheless could find discrimination. The credibility of the prosecutor's explanation goes to the heart of the equal protection

> analysis, and once that has been settled, there seems nothing left to review.

Hernandez, 500 U.S. at 366-67 (citation omitted).

Second, Ms. Lamon took a contrary position in the court of appeals when she cited *Lopez* for the principle that the clearly erroneous standard governed whether a peremptory strike was discriminatory (Ms. Lamon's court of appeals brief-in-chief at 8). She cannot now change course and ask this court to apply a *de novo* standard. *State v. Martinez*, 150 Wis. 2d 62, 71 n.4, 440 N.W.2d 783 (1983) (litigant cannot adopt contrary strategy in Wisconsin Supreme Court).

Third, the only supporting case cited in Ms. Lamon's current brief is *Holder v. Welborn*, 60 F.3d 383 (7th Cir. 1995). Procedural facts easily distinguish *Holder*. In that collateral attack case, the habeas court held a *Batson* hearing eight years after the original voir dire and trial. The habeas judge and the magistrate conducting the *Batson* hearing had not been present at the original voir dire proceeding and "therefore did not have the opportunity to observe the demeanor of the members of the venire as they answered the questions posed by the attorneys." *Id.* at 388. The prosecutors had little memory of the actual voir dire. The habeas court therefore was in no better position to judge the credibility of the prosecutor or the eliminated jurors than the appellate court. Because no deference to the trial court's decision was warranted under those circumstances, the appellate court applied a *de novo* standard of review. *Id.*

Ms. Lamon's direct appeal simply does not suffer from the passage of time, change of judge and loss of memory that explain why conclusions of the *Holder* habeas judge were reviewed *de novo* on appeal. Judge Dahlberg had ample personal opportunity, while presiding over Ms. Lamon's voir dire, to evaluate the credibility of Assistant District Attorney Bollendorf and Dondre Bell.

Therefore, the usual clearly erroneous standard of review governs this case.

D. Ms. Lamon failed to satisfy her burden of proving purposeful discrimination.

Once Assistant District Attorney Bollendorf proffered her race-neutral explanation, it fell to Ms. Lamon to prove purposeful discrimination. *Walker*, 154 Wis. 2d at 158. Ms. Lamon failed to prove anything of the sort.

Ms. Lamon correctly notes that the third *Batson* step requires consideration of the "totality of the relevant facts." *Hernandez*, 500 U.S. at 363; brief-in-chief at 10. Various courts have identified factors that may be considered in analyzing a purposeful discrimination claim. *Cf. Walker*, 154 Wis. 2d at 173-74 (circumstances to be considered in assessing whether opponent has established prima facie case). Ms. Lamon overstates the nature of those various lists, however, when she characterizes them as "factors whose presence shows discrimination by the prosecutor" (brief-in-chief at 10). Instead, they are more properly and more loosely characterized as factors weighing against race neutrality or illustrative of evidence that can be used to raise an inference of discriminatory intent. *See, e.g., State v. Slappy*, 522 So. 2d 18, 22 (Fla. 1988) (factors weighing against neutrality); *Ex Parte Branch*, 526 So. 2d 609, 621-25 (Ala. 1987) (illustrative of evidence that can be used to raise inference).

Ms. Lamon stops short of asking this Court to announce an additional list of factors to be considered at the third *Batson* step. Because Wisconsin courts have been able to apply *Batson* effectively without additional analytic framework, and because the relevant "totality of facts" will differ in each case, the state encourages this Court to forego imposing further analytic requirements on

Batson claims. Existing Wisconsin case law provides sufficient examples of the scope and nature of information to be considered. *E.g., Walker*, 154 Wis. 2d at 178-79 (impermissible to strike venireperson of color because prosecutor had no information about him); *Davidson*, 166 Wis. 2d at 41-42 (permissible to strike venireperson of color who shared last name with other persons, a large percentage of whom had criminal records); *Guerra-Reyna*, 201 Wis. 2d at 759 (impermissible to strike venireperson because of membership in cognizable class, Mexican). As Ms. Lamon's argument demonstrates, conversely, the danger of such lists is that nuances important in a particular set of facts become lost amongst the categories of the list.

Moreover, Wisconsin does not share the history of institutionalized race discrimination experienced by many of the southern jurisdictions that have adopted structured frameworks for third step *Batson* analysis. In fact, the recent Public Trust and Confidence in the Justice System Study did not identify discriminatory peremptory strikes as a cause for concern or remedial action. *See* Office of the Chief Justice, the Director of State Courts, the League of Women Voters of Wisconsin, and the State Bar of Wisconsin, *Public Trust & Confidence in the Justice System: The Wisconsin Initiative* (October 2000) 31-33.

As the present case demonstrates, existing legal authority provides a sufficient analytic foundation for the third step of the *Batson* test. At the same time, the *Batson* analysis continues to afford prosecutors latitude to act on non-discriminatory intuitive assumptions about the latent inclinations of a prospective juror. *Hughes*, 970 F.2d at 231.

Assistant District Attorney Bollendorf identified numerous race-neutral reasons for her peremptory strike against Bell. Those specific reasons included a number of Bells prosecuted by her office and the federal prosecutor; the reputation of "Bell" as a criminal name in Beloit; Bell's residence, at an address in a high crime area, where

there had been numerous police contacts; Bell's indication that his employment for the past five years had varied; and Bell's lack of response to her voir dire questions about relatives or close friends who had been convicted of a crime or the victim of a crime (60:25-28; P-Ap. 6-9).

In *Gregory*, the court of appeals upheld a prosecutor's use of a peremptory strike to eliminate Bell from another venire for very similar reasons. 244 Wis. 2d 65, ¶9. In *Gregory*, Bell indicated during voir dire that he had an uncle involved with cocaine. The prosecutor based his strike on Bell's testimony, police records indicating police had been to Bell's home seventeen times in the past, and information that someone named Christopher Bell had been arrested in one of the largest cocaine rings in Rock County. *Id.* Although the prosecutor's information was not verified, discriminatory purpose was not found because the defendant failed to make any showing of pretext. *Id.* at ¶10.

The explanations proffered in both *Gregory* and the present case lacked any facial reference to race. They were persuasive, plausible, and non-pretextual.

Familial relationship to individuals involved in the criminal justice system provides a race-neutral reason for a peremptory strike. *See, e.g., Gregory*, 244 Wis. 2d 65, ¶13; *Davidson,* 166 Wis. 2d at 41; *United States v. Johnson,* 941 F.2d 1102, 1109 (10th Cir. 1991) (strike of black venireperson because brother once convicted of crime and because family history suggested anti-government bias); *United States v. Bennett*, 928 F.2d 1548, 1551 (11th Cir. 1991) (prior family involvement with drug offenses); *United States v. Wiggins*, 104 F.3d 174, 176 (8th Cir. 1997) (prior contacts of venireperson and relative of venireperson with criminal justice system); *United States v. Hughes*, 911 F.2d 113 (8th Cir. 1990) (incarceration of venireperson's family member).

Courts also have accepted the rationale that a venireperson's name may be sufficient to imply a

relationship to known criminals with the same name. *Davidson*, 166 Wis. 2d. at 41-42; *United States v. Terrazas-Carrasco,* 861 F.2d 93, 94-95 and n.1 (5th Cir. 1988); *Davidson v. Gengler*, 852 F. Supp. 782, 788 (W.D. Wis. 1994); *People v. Smith,* 602 N.E.2d 946, 950 (Ill. App. Ct. 1992); *Ridley v. State*, 510 S.E.2d 113, 116 (Ga. Ct. App. 1999) ("many, many" cases shared the common last name); *Ex Parte Bird v. Warner*, 594 So. 2d 676, 678 (Ala. 1991).

Bell's failure to disclose during voir dire any police contacts[3] at his residence is a plainly race-neutral justification for striking him. *See Coulter v. Gilmore,* 155

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[3]In the court of appeals, Ms. Lamon separately challenged Assistant District Attorney Bollendorf's explanation that Bell lived in a high crime neighborhood as bearing no relationship to the facts of this case (Ms. Lamon's brief at 10). Ms. Lamon has abandoned that argument in this court.

Her court of appeals argument did not accurately reflect how Bell's neighborhood figured in Assistant District Attorney Bollendorf's analysis. Assistant District Attorney Bollendorf had not proffered Bell's residence as an isolated reason for striking Bell. Instead, Bell's neighborhood was mentioned only in the context of his possible connection to the criminal Bell family (60:25-26; P-Ap. 6-7). Thus, the fact that Bell resided at an address in a high crime area and with known police contacts supported Assistant District Attorney Bollendorf's concern that Bell had not been forthcoming in his responses to her voir dire questions.

Moreover, case law is quite clear that location of a venireperson's residence provides a race-neutral reason for a peremptory strike when the residential location has some relationship to the facts of the case. *United States v. Briscoe*, 896 F.2d 1476, 1488-89 (7th Cir. 1990) (upholding peremptory strike where prosecutor's explanation "went well beyond a cursory statement that Mr. Jeffries lived on the west side of Chicago.") *Cf. Williams v. Chrans*, 957 F.2d 487, 489-90 (7th Cir. 1992) (recognizing that allowing the exclusion of black venirepersons simply because they live or work in an area frequented by gangs has "an enormous potential to disproportionately exclude black jurors in most cases involving black gang members"). As the Ninth Circuit has explained, "What matters is not *whether* but *how* residence is used." *United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992) (emphasis in original).

F.3d 912, 919-20 (7th Cir. 1998) (calling the prosecution's striking of two venirepersons because they failed to disclose that they had been previously charged with crimes "plainly race-neutral and legitimate"). *See also Baldwin v. State*, 732 So. 2d 236, 243 (Miss. 1999) (prosecutor's explanation that venirepersons lived in high drug trafficking areas and had family members who had been convicted of crimes found to be race-neutral).

As for Bell's "varie[d]" employment, Assistant District Attorney Bollendorf explained that Bell's juror card information affected the state's view of Bell as a responsible juror (60:27; P-Ap. 8). The Seventh Circuit has held that unemployment may provide a sufficiently race-neutral explanation for a strike. *United States v. Lewis*, 117 F. 3d 980, 983 (7th Cir. 1997). One of the cases that *Lewis* relies on for that proposition recognizes unstable employment as a sufficient race-neutral explanation. *United States v. Hunter*, 86 F.3d 679, 683 (7th Cir. 1996). Other cases recognize the same proposition. *See, e.g., State v. Hernandez*, 823 P.2d 1309, 1313 (Ariz. Ct. App. 1991); *United States v. Jackson*, 914 F.2d 1050, 1052-53 (8th Cir. 1990).

With regard to all those reasons, as Judge Dillon later noted, Assistant District Attorney Bollendorf's explanations were informed by her "homework" (71:3; R-Ap. 119). Assistant District Attorney Bollendorf relied upon a detailed police report of contacts at Bell's address, as well as her personal knowledge of prosecutions against other Bells and her observations during voir dire. Possession of that background information lends credibility to Assistant District Attorney Bollendorf's explanation and distinguishes this case from the foreign case law upon which Ms. Lamon relies.

In *Ex parte Bird*, 594 So. 2d 676, 682-83 (Ala. 1991), the prosecutor had nothing other than generalized suspicion to support her belief that a venireperson might be related to a former defendant. *Cf.* brief-in-chief at 10.

In *Esteves v. State*, 859 S.W.2d 613, 615 (Tex. Crim. App. 1993), similarly, nothing supported the prosecution's claim that the struck venireperson might have been a witness or a member of the defendant's family. *Cf.* brief-in-chief at 10.

In *Washington v. Commonwealth*, 4 S.W.3d 376, 379 (Ky. 2000), the prosecution first denied ever striking the venireperson in question. Little wonder that the appellate court found the prosecution's subsequent explanations disingenuous and incredible—such as the prosecutorial assertion that the forty-three-year-old venireperson was struck because of his youth. *Id.* at 378-79. *Cf.* brief-in-chief at 10. Under those circumstances, the prosecutor's explanation amounted to little more than general denial of discriminatory motive. *Cf. Batson*, 476 U.S. at 98.

Ms. Lamon has never identified any information undermining Assistant District Attorney Bollendorf's race neutral explanations. Instead, she only casts aspersions on Assistant District Attorney Bollendorf.

Ms. Lamon's claim that Assistant District Attorney Bollendorf "refused" to ask Bell any questions is incorrect (brief-in-chief at 9). Assistant District Attorney Bollendorf asked Bell the same general questions she asked all other members of the venire, and possessed additional information about Bell besides. This is not a case in which a prosecutor exercised a peremptory strike on the basis of no information whatsoever.

Individual follow-up questions simply are not required before exercising a peremptory strike. *Davidson v. Gengler,* 852 F. Supp. 782, 789 (W.D. Wis. 1994) (prosecutor did not need to inquire whether venireperson was related to known criminals when telephone book examination indicated that 62 percent of individuals with same last name had been charged with crime; "Even if the assumption of relationship were based purely on intuition, it would not be impermissible.")

In the present case, Judge Dahlberg did not expressly address lack of individual questions in finding Assistant District Attorney Bollendorf's reasons race-neutral. He did ask why Assistant District Attorney Bollendorf had not inquired about her concerns with Bell. She responded that the police printout spoke for itself; that given Bell's lack of response to her general questions, he likely wouldn't have responded forthrightly to further voir dire; and that, under the circumstances, she did not want to appear to be singling out Bell (60:29-30; P-Ap.10-11).

As for lack of any individual questions to Bell, Judge Dillon explained that "[t]he fact that the prosecutor did her homework on Mr. Bell is evident by the fact she possessed a computer printout of police contacts at Mr. Bell's home at the time of the voir dire" (71:3; R-Ap. 119). Judge Dillon further explained that it was not necessary for Assistant District Attorney Bollendorf to question Bell in front of the other jurors in order to prove that there was a reason for him to be struck; she needed only a race-neutral explanation, and her suspicion that Bell was not being candid provided a sufficient explanation. Judge Dillon continued, "A perspective [sic] juror's failure to mention his likely acquaintance with the victim of a crime, even though the perspective [sic] juror lives in a home where police have been called on crime complaints on at least two recent occasions, is enough reason for the strike" (71:3; R-Ap. 119).

Ms. Lamon's insistence on individualized questions demonstrates the difficulty with standard lists of *Batson* considerations and rote application of those considerations in any given case. One possible interpretation for lack of individualized questions to a struck venireperson could be purposeful discrimination. Depending on the particular facts, though, competing interpretations could be that the prosecution did not want to single out the venireperson or did not think that individualized questioning was necessary. Or, as in the present case and *Gregory*, the prosecutor had obtained sufficient information from other sources. "Where multiple inferences are possible from

credible evidence," an appellate court "must accept those drawn by the trial court." *Lopez*, 173 Wis. 2d at 730. As *Hernandez* teaches, the proponent's credibility lies at the heart of the purposeful discrimination analysis and the trial court is best situated to assess that credibility. *Hernandez*, 500 U.S. at 365.

In *Mack v. State*, for example, the court reasoned that lack of questioning could be considered when the prosecution is acting on "mere suspicion." 650 So. 2d 1289, 1298 (Miss. 1995).

Slappy, 522 So. 2d at 22-24, identifies a standard list of factors that might tend to show that the state's proffered reasons were not supported by the record or were an impermissible pretext. One of those factors was "failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror." *Slappy*, 522 So. 2d at 22. Ironically, given Ms. Lamon's argument, another of the factors was "singling the juror out for special questioning designed to evoke a certain response." *Slappy*, 522 So. 2d at 22. In any event, the problem in *Slappy* was total failure to question challenged jurors on the grounds proffered for striking them. *Slappy*, 522 So. 2d at 23. In the present case, Assistant District Attorney Bollendorf had included Bell along with the other venirepersons in her general voir dire questions. *Cf.* brief-in-chief at 10. The fact that presence or absence of individualized questioning can cut both ways, further demonstrates the wisdom of deferring to trial court perceptions and credibility determinations.

Even cases like *Slappy*, however, acknowledge a prosecutor's right to exercise peremptory challenges on the basis of legitimate "hunches" and past experience. *Slappy*, 743 S.W.2d at 65. Absolute certainty is not required to defeat alleged pretext.

For example, in a case similar to Ms. Lamon's, the prosecution struck four black venirepersons because each

had children with felony convictions. *Williams v. State*, 511 S.E.2d 561, 563 (Ga. Ct. App. 1999). The prosecution learned that information from local law enforcement officials and did not question any of the venirepersons to determine if they were actually related to the convicted felons. The strikes were upheld on appeal, on reasoning that the prosecution need not question a venireperson when the state has specific information that a venireperson's relative has been convicted of a crime. However the venireperson might answer, the state would be entitled to strike. "Even if the prosecutor is mistaken about the existence of a relationship, a strike may be 'based upon mistake or ignorance . . . so long as it is not whimsical or fanciful but is neutral, related to the case to be tried, and a clear and reasonably specific explanation of the legitimate reasons for exercising the challenges." *Id* (internal quotation omitted).

For all the reasons discussed above, Assistant District Attorney Bollendorf's peremptory strike against Bell was not mistaken, ignorant, whimsical or fanciful. It was solidly grounded in information Assistant District Attorney Bollendorf had obtained before voir dire, and on her voir dire observations of Bell. Asked to explain her strike, she neutrally pointed to specific information and explained how it related to the present case. Race was never mentioned. Assistant District Attorney Bollendorf's explanation was everything that *Batson* requires. Based on the totality of circumstances, including Ms. Lamon's failure to identify any evidence of discriminatory intent, Judge Dahlberg was entirely warranted in finding Assistant District Attorney Bollendorf's explanation sufficiently credible to defeat Ms. Lamon's *Batson* claim.

To Ms. Lamon's bald contention that Assistant District Attorney Bollendorf automatically assumed that "the black juror would lie" (brief-in-chief at 12), the state responds that nothing of the sort occurred. The record lacks any evidence whatsoever that Assistant District Attorney Bollendorf assumed Bell would lie because he is African-American. The record instead documents that

Assistant District Attorney Bollendorf had concerns about Bell's candor because his non-responsiveness to her general voir dire questions appeared to conflict with her information about Bell's address and possible family members. Rather than prejudging Bell's credibility, Assistant District Attorney Bollendorf's concern about Bell solidified as voir dire proceeded and Bell failed to answer questions which appeared to apply to him. Even before *Batson*, the Supreme Court made clear that purposeful discrimination must be proven—not just assumed or asserted. *Swain*, 380 U.S. at 209. Ms. Lamon offers nothing more than assumption or assertion on this point.

Furthermore, Assistant District Attorney Bollendorf's explanation for why she did not pose individual questions to Bell expressly indicated that she "did not want to appear as though I was singling him out under the circumstances" (60:30; A-Ap. 11). Certainly it was reasonable for Assistant District Attorney Bollendorf not to single out the only African-American venireperson for individualized inquiry about whether he had truthfully answered questions about having lawbreakers or crime victims in his family. Had Assistant District Attorney Bollendorf done so, Ms. Lamon might be in this Court claiming differential and prejudicial questioning of the only African-American venireperson in an apparent effort to establish grounds for a peremptory strike.

In summary, Judge Dahlberg had the opportunity to observe the voir dire proceedings, evaluate the credibility of Bell's non-responses and Assistant District Attorney Bollendorf's explanations, and consider the sufficiency of Assistant District Attorney Bollendorf's explanations about Bell's lack of candor and her decision to forego individualized questions. Judge Dahlberg ultimately found that Assistant District Attorney Bollendorf's explanation for striking Bell satisfied the race-neutral standard required by *Batson*. Judge Dillon, in postconviction proceedings, agreed. On the full record of this case, those conclusions were not clearly erroneous.

Ms. Lamon has provided absolutely no direct or circumstantial proof of actual discriminatory intent for Assistant District Attorney Bollendorf's peremptory strike of Dondre Bell. Accordingly, this Court must reject her *Batson* claim.

CONCLUSION

For the reasons discussed above, the state respectfully requests that this Court affirm Lamon's judgment of conviction and Judge Dillon's order denying postconviction relief.

Dated this 26th day of November, 2002.

Respectfully submitted,

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Attorney General

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State Bar #1015694

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Respondent

Assisted by:

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,990 words.

Dated this 26th day of November, 2002.

Mary E. Burke
Assistant Attorney General

INDEX TO APPENDIX

1216 WISCONSIN

- - - PRIOR INCIDENTS AT '1216 WISCONSIN AV' - - -

```
 1 8219824 10/17/98 WELF-CHECK WELFARE
 2 7028714 02/11/97 CPS-CIVIL PAPER SERVICE
 3 7028108 02/10/97 CPS-CIVIL PAPER SERVICE
 4 6159363 08/06/96 FOL-FOLLOW UP
 5 6159181 08/06/96 FOL-FOLLOW UP
 6 6159136 08/06/96 FOL-FOLLOW UP
 7 6157501 08/04/96 FOL-FOLLOW UP
 8 6154683 07/31/96 AUTO-AUTO THEFT                          96-007750
 9 6085579 04/30/96 DC-DISORDERLY CONDUCT
10 6041724 02/29/96 CPS-CIVIL PAPER SERVICE
11 6041685 02/29/96 CPS-CIVIL PAPER SERVICE
12 6023465 02/04/96 CPS-CIVIL PAPER SERVICE
13 6010210 01/16/96 FOL-FOLLOW UP
14 6009595 01/15/96 CODE-CODE ENFORCEMENT
15 6007547 01/12/96 FOL-FOLLOW UP
16 6006858 01/11/96 THFT-THEFT
17 6005937 01/10/96 FOL-FOLLOW UP
18 5246276
19 5241143
```

EXHIBIT 4-14-99 #1 ARCE 1825

Enter line number for more info, Back, Top, eXit, 'RETURN': ___

POLICE DISPATCH 1

```
1. Pri:          2. Back:                 |1. Pri: 3391    2. Back: B307
                                          |
3. Nature:                                |3. Nature: WELF-CHECK WELFARE
   Apt:             4. Priority:          |   Apt:            4. Priority: 2
5. Loc:                                   |5. Loc: 1216 WISCONSIN AV
      6. Grid:                            | BE   6. Grid: BE81   1098 KEELER AV
                                          | BE5A                 1098 WHITE
7. Notes:                                 |7. Notes: AMY WAS OKAY.
8. Lo2:                                   |8. Lo2:
                                          | GENERAL INCIDENT - SEE PAGE 2
                                          |
 R         S         D         A          | R 17:10   S 17:10   D 17:15   A 17:17
                                          |
 9. Tag:                St:    Typ:       | 9. Tag:                St:    Typ:
10. DL#:                          St:     |10. DL#:                          St:
11. Descr:                                |11. Descr:
12. Notes:                                |12. Notes:
13. Report:                14. Num:       |13. Report:                14. Num:
15. Code:      16. Code:                  |15. Code: NR   16. Code:
```

15-10

ENTER: 11:43 | 8219824 ENTER: Active :
STAT | LNS CGJ Waiting:
'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____

POLICE DISPATCH 1

Notes for WELF-CHECK WELFARE at 1216 WISCONSIN AV

Backup officer: SUMMERS, TRACEY S
Primary officer: DONOVAN, MATTHEW J
Time closed: 17:22:13
Disposition 1: NR NO REPORT

CK WELFARE AMY PINSON (LNS)	17:10:57
FEMALE WAS IN CAR AND WASNT GETTING OUT (LNS)	17:11:11
ROCKING CAR BACK/FORTH (LNS)	17:11:18
SHE IS NOW IN THE HOUSE...BUT NEEDS TO BE CKED (LNS)	17:11:31
HAS HISTORY OF MENTAL PROBLEMS (LNS)	17:11:44
WAS AT MENTAL HEALTH HOSP IN ROCKFORD.. (LNS)	17:12:01
UKN IF SHE IS TAKING MEDS OR NOT (LNS)	17:12:15
UKN IF ON ANY DRUGS.. (LNS)	17:12:21
HAS BEEN VIOLENT IN PAST (LNS)	17:13:12
RP IS MOTHER NOT ABLE TO GET TO RES.. (LNS)	17:13:21
RES IS COUSIN:..HAD CONTACT W/ COUSIN ADVISED POLICE (LNS)	17:13:43
WERE COMING HE SAID GOOD... (LNS)	17:13:51
AMY WAS IN HOUSE AT THAT TIME (LNS)	17:13:57
**TX FOR 1216 WISCONSIN GENE BELL 363-9330 (LNS)	17:15:26
P.D. Response area is BE5A	17:15:49

'RETURN' FOR MORE LINES, 'X' TO EXIT: _

POLICE DISPATCH 1

Notes for WELF-CHECK WELFARE at 1216 WISCONSIN AV

SUBJECT LEFT IN CAR...ALL OK PER MALE SUBJECT AT THIS LOCATION (CGJ)	17:19:16
Remarks from MDT, DONOVAN, MATTHEW J: SHE HAD JUST LEFT THIS RESIDENCE	17:21:41
IN HER CAR AND SHE WAS FINE ACCORDING TO THE RESIDENT. HE DID NOT	17:21:41
APPEAR CONCERNED FOR AMY'S WELFARE AND THAT HIS DEMEANOR INDICTED THAT	17:21:41
AMY WAS OKAY.	17:21:41

'RETURN' to proceed, 'T' for top: _

POLICE DISPATCH 1

GENERAL INCIDENT From LNS

6.5-11

```
11. Respond to:
12. Persons ... :
13. Persons ... :
14. Vehicles/dir:                                          Tag:
15. Weapons ... :
16. Notes: P.D. Response area is BE5A
           SUBJECT LEFT IN CAR...ALL OK PER MALE SUBJECT AT THIS LOCATION (CGJ)
           Remarks from MDT, DONOVAN, MATTHEW J: SHE HAD JUST LEFT THIS RESIDENC
E          IN HER CAR AND SHE WAS FINE ACCORDING TO THE RESIDENT. HE DID NOT
           APPEAR CONCERNED FOR AMY'S WELFARE AND THAT HIS DEMEANOR INDICTED THA
T          AMY WAS OKAY.

                PRESS 'RETURN' KEY: _
```

```
                                                                POLICE DISPATCH  1

1. Pri: 4731     2. Back:                    |1. Pri:          2. Back:
                                             |
3. Nature: CPS-CIVIL PAPER SERVICE           |3. Nature:
   Apt:              4. Priority: 4          |   Apt:             4. Priority:
5. Loc: 1216 WISCONSIN AV                    |5. Loc:
 BE   6. Grid: BE81    1098 KEELER AV        |      6. Grid:
 BE5A                  1098 WHITE            |
7. Notes:                                    |7. Notes:
8. Lo2:                                      |8. Lo2:
                                             |
                                             |
 R 11:50   S 11:50   D 11:50   A 11:50       | R         S         D         A
                                             |
 9. Tag:                St:    Typ:          | 9. Tag:                St:    Typ:
10. DL#:                         St:         |10. DL#:                         St:
11. Descr:                                   |11. Descr:
12. Notes:                                   |12. Notes:
13. Report:              14. Num:            |13. Report:              14. Num:
15. Code: NR   16. Code:                     |15. Code:       16. Code:
                                             |
  7028714    ENTER:              11:46       |            ENTER:          Active :
     JLS                        STAT        |                            Waiting:
    'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____
```

```
                                                                POLICE DISPATCH  1

Notes for CPS-CIVIL PAPER SERVICE at 1216 WISCONSIN AV

Primary officer: GARVIN, PATRICK J
Time closed: 11:53:49
Disposition 1: NR NO REPORT
```

105-12

'RETURN' to proceed: _

POLICE DISPATCH 1

1. Pri: 4731 2. Back:

3. Nature: CPS-CIVIL PAPER SERVICE
Apt: 4. Priority: 4
5. Loc: 1216 WISCONSIN AV
BE 6. Grid: BE81 1098 KEELER AV
BE5A 1098 WHITE
7. Notes: rom: 1673 NELSON AV-BE (JMA)
8. Lo2:

R 14:03 S 14:03 D 14:03 A 14:03

9. Tag: St: Typ:
10. DL#: St:
11. Descr:
12. Notes:
13. Report: 14. Num:
15. Code: ATT 16. Code:

7028108 ENTER: 11:46
JMA STAT
'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____

1. Pri: 2. Back:

3. Nature:
Apt: 4. Priority:
5. Loc:
6. Grid:

7. Notes:
8. Lo2:

R S D A

9. Tag: St: Typ:
10. DL#: St:
11. Descr:
12. Notes:
13. Report: 14. Num:
15. Code: 16. Code:

ENTER: Active :
Waiting:

POLICE DISPATCH 1

Notes for CPS-CIVIL PAPER SERVICE at 1216 WISCONSIN AV

Primary officer: GARVIN, PATRICK J
Time closed: 14:12:20
Disposition 1: ATT ATTEMPTED SERVICE
Incident location changed from: 1673 NELSON AV-BE (JMA) 14:09:42

'RETURN' to proceed: _

POLICE DISPATCH 1

1. Pri: B305 2. Back:

3. Nature: FOL-FOLLOW UP
Apt: 4. Priority: 4
5. Loc: 1216 WISCONSIN AV
BE 6. Grid: BE81 1098 KEELER AV
BE5A 1098 WHITE

1. Pri: 2. Back:

3. Nature:
Apt: 4. Priority:
5. Loc:
6. Grid:

10.5-13

```
 R 19:36   S 19:36   D 19:36   A 19:36 | R         S         D         A
                                       |
 9. Tag:                 Typ:          | 9. Tag:                St:   Typ:
10. DL#:                   St:         |10. DL#:                        St:
11. Descr:                             |11. Descr:
12. Notes:                             |12. Notes:
13. Report:          14. Num:          |13. Report:                  14. Num:
15. Code: NR   16. Code:               |15. Code:       16. Code:
                                       |
  6159363    ENTER:          11:47     |              ENTER:          Active :
 MDT MDT                     STAT      |                              Waiting:
    'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____
```

```
                                                          POLICE DISPATCH  1

Notes for FOL-FOLLOW UP at 1216 WISCONSIN AV

Primary officer: KELLEY, JASON C
Time closed: 19:44:37
Disposition 1: NR NO REPORT
CREATED BY MDT B305                                                19:36:36
Incident location changed from: 1216 WISCONSIN (TLB)               19:44:35
```

```
                'RETURN' to proceed: _
```

```
                                                          POLICE DISPATCH  1
```

```
1. Pri: B305    2. Back: B303          |1. Pri:          2. Back:
                                       |
3. Nature: FOL-FOLLOW UP               |3. Nature:
   Apt:          4. Priority: 4        |   Apt:            4. Priority:
5. Loc: 1216 WISCONSIN AV              |5. Loc:
 BE   6. Grid: BE81   1098 KEELER AV   |      6. Grid:
 BE5A                 1098 WHITE       |
7. Notes: set on unit B305 at 16:25:58 |7. Notes:
8. Lo2:                                |8. Lo2:
                                       |
                                       |
 R 15:21   S 15:21   D 15:21   A 15:21 | R         S         D         A
                                       |
 9. Tag:               St:   Typ:      | 9. Tag:                St:   Typ:
10. DL#:                     St:       |10. DL#:                        St:
11. Descr:                             |11. Descr:
12. Notes:                             |12. Notes:
13. Report:          14. Num:          |13. Report:                  14. Num:
15. Code: AR   16. Code:               |15. Code:       16. Code:
                                       |
  6159181    ENTER:          11:47     |  CAS-14      ENTER:          Active :
 MDT MDT                     STAT      |                              Waiting:
    'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____
```

```
Notes for FOL-FOLLOW UP @  1216 WISCONSIN AV

Backup officer: KUMLIEN, JAMES M
Primary officer: KELLEY, JASON C
Time closed: 16:29:02
Disposition 1: AR ARREST
CREATED BY MDT B305                                                    15:21:13
Incident location changed from: 1216 WISCONSIN (KSM)                   15:22:07
ONE IN CUSTODY (KSM)                                                   15:23:57
Unit B305 current location: 10-19 M 95 (KSM)                           15:26:01
Unit B305 current location: PD W 95 (KSM)                              15:31:32
Timer reset on unit B305 at 15:39:32                                   15:39:32
Timer reset on unit B305 at 15:55:07                                   15:55:07
Timer reset on unit B305 at 16:10:12                                   16:10:12
Timer reset on unit B305 at 16:25:58                                   16:25:58

                'RETURN' to proceed: _

                                                        POLICE DISPATCH  1

1. Pri: A305     2. Back:                    |1. Pri:          2. Back:
                                             |
3. Nature: FOL-FOLLOW UP                     |3. Nature:
   Apt:              4. Priority: 4          |   Apt:             4. Priority:
5. Loc: 1216 WISCONSIN AV                    |5. Loc:
 BE    6. Grid: BE81    1098 KEELER AV       |      6. Grid:
 BE5A                   1098 WHITE           |
7. Notes: set on unit A305 at 14:34:27       |7. Notes:
8. Lo2:                                      |8. Lo2:
                                             |
                                             |
 R 14:04    S 14:05    D 14:11    A 14:18    | R          S          D          A
                                             |
 9. Tag:                 St:     Typ:        | 9. Tag:                 St:     Typ:
10. DL#:                          St:        |10. DL#:                           St:
11. Descr:                                   |11. Descr:
12. Notes:                                   |12. Notes:
13. Report:                14. Num:          |13. Report:                 14. Num:
15. Code: NR    16. Code:                    |15. Code:       16. Code:
                                             |
  6159136    ENTER:                 11:48    |              ENTER:          Active :
 CNH JMA                            STAT     |                              Waiting:
     'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____

                                                        POLICE DISPATCH  1

Notes for FOL-FOLLOW UP at 1216 WISCONSIN AV

Primary officer: WELLS, MELVIN L
Time closed: 14:34:52
Disposition 1: NR NO REPORT
REF STOLEN LEBARON (CNH)                                               14:05:00
*REQ THE INFO NOT GIVEN OVER THE SCANNER....KIDS (CNH)                 14:05:24
*HAVE BEEN THRU ENOUGH (CNH)                                           14:05:29
VEHICLE HAS BEEN RECOVERED, THEY WERE TRANSFERRED (CNH)                14:05:49
FROM THE PD TO DISPATCH (CNH)                                          14:05:53
P.D. Response area is BE5A                                             14:11:42
```

65-15

'RETURN' to proceed: _

POLICE DISPATCH 1

1. Pri: A303 2. Back:

3. Nature: FOL-FOLLOW UP
Apt: 4. Priority: 4
5. Loc: 1216 WISCONSIN AV
BE 6. Grid: BE81 1098 KEELER AV
BE5A 1098 WHITE
7. Notes: set on unit A303 at 09:58:03
8. Lo2:
GENERAL INCIDENT - SEE PAGE 2

R 09:27 S 09:27 D 09:36 A 09:36

9. Tag: St: Typ:
10. DL#: St:
11. Descr:
12. Notes:
13. Report: 14. Num:
15. Code: 16. Code:

ENTER:

1. Pri: 2. Back:

3. Nature:
Apt: 4. Priority:
5. Loc:
6. Grid:

7. Notes:
8. Lo2:

R S D A

9. Tag: St: Typ:
10. DL#: St:
11. Descr:
12. Notes:
13. Report: 14. Num:
15. Code: 16. Code:

ENTER: Active :
Waiting:

POLICE DISPATCH 1

Notes for FOL-FOLLOW UP at 1216 WISCONSIN AV

Primary officer: FLUEGEL, ROBERT L
Time closed: 10:06:08
Disposition 1: NR NO REPORT

WANTS OFFICER TO CALL (LNS)	09:27:53
WANTS OFFICER TO CALL...***NOTHING OVER RADIO***** (LNS)	09:28:59
RE;STOLEN VEHICLE REPORTED 7/31 CASE NO 96-7760 (LNS)	09:29:33
OFFICER KELLEY... (LNS)	09:29:38
RP HAS POSS INFO ON NAMES OF SUSPECT.... (LNS)	09:29:51
*Location changed from 1215 WISCONSIN AV	09:30:30
P.D. Response area is BE5A	09:36:17
Unit A303 current location: PD/PHONE (JMA)	09:36:29
Timer reset on unit A303 at 09:58:03	09:58:03

'RETURN' to proceed: _

65-16

POLICE DISPATCH 1

```
- - - PRIOR INCIDENTS AT '1216 WISCONSIN AV

 1 8219824 10/17/98 WELF   HECK WELFARE
 2 7028714 02/11/97 CPS-C.IVIL PAPER SERVICE
 3 7028108 02/10/97 CPS-CIVIL PAPER SERVICE
 4 6159363 08/06/96 FOL-FOLLOW UP
 5 6159181 08/06/96 FOL-FOLLOW UP
 6 6159136 08/06/96 FOL-FOLLOW UP
 7 6157501 08/04/96 FOL-FOLLOW UP
 8 6154689 07/31/96 AUTO-AUTO THEFT                                  96-007760
 9 6085579 04/30/96 DC-DISORDERLY CONDUCT
10 6041724 02/29/96 CPS-CIVIL PAPER SERVICE
11 6041685 02/29/96 CPS-CIVIL PAPER SERVICE
12 6023465 02/04/96 CPS-CIVIL PAPER SERVICE
13 6010210 01/16/96 FOL-FOLLOW UP
14 6009595 01/15/96 CODE-CODE ENFORCEMENT
15 6007547 01/12/96 FOL-FOLLOW UP
16 6006858 01/11/96 THFT-THEFT
17 6005997 01/10/96 FOL-FOLLOW UP
18 5246276
19 5241143

      Enter line number for more info, Back, Top, eXit, 'RETURN': 8__

                                                        POLICE DISPATCH  1

1. Pri: B305    2. Back:                    |1. Pri:          2. Back:
                                            |
3. Nature: AUTO-AUTO THEFT                  |3. Nature:
   Apt:            4. Priority: 3           |   Apt:             4. Priority:
5. Loc: 1216 WISCONSIN AV                   |5. Loc:
 BE    6. Grid: BE81    1098 KEELER AV      |      6. Grid:
 BE5A                   1098 WHITE          |
7. Notes: N MILWUAKEE AREA NOW.. (CGJ)      |7. Notes:
8. Lo2:                                     |8. Lo2:
 GENERAL INCIDENT - SEE PAGE 2              |
                                            |
 R 15:12   S 15:12   D 16:27   A 16:29      | R         S         D         A
                                            |
 9. Tag:                St:    Typ:         | 9. Tag:                St:    Typ:
10. DL#:                        St:         |10. DL#:                        St:
11. Descr:                                  |11. Descr:
12. Notes:                                  |12. Notes:
13. Report: 96-007760     14. Num: 1        |13. Report:                14. Num:
15. Code: R    16. Code:                    |15. Code:       16. Code:
                                            |
  6154689    ENTER:              11:49      |            ENTER:          Active :
 MRB CGJ                         STAT       |                            Waiting:
     'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____

                                                        POLICE DISPATCH  1

Notes for AUTO-AUTO THEFT at 1216 WISCONSIN AV

Primary officer: KELLEY, JASON C
Time closed: 17:14:54
Disposition 1: R REPORT LEFT                                          15:12:36
1987 CHRYSLER LABARON (MRB)                                           15:12:44
BURGANDY IN COLOR. TAN ON BOTTON. (MRB)                               15:12:54
LIC/LICENSE APPLIED FOR. (MRB)                                        15:12:58
HAS SUSPECT. (MRB)                                                    15:13:05
!*** Nature changed from AUTO AUTO THEFT ***                          15:13:29
STEP DAD BORROWED THE VEHICLE ON MONDAY AND NEVER RETURNED. (MRB)     16:27:29
P.D. Response area is BE5A                                            16:46:35
Timer reset on unit B305 at 16:46:35
```

105-17

```
ALL OK (CGJ)
!*** Nature changed from CD CIVIL DISPUTES ***                    17:06:30
Priority changed from 4                                           17:06:30
*Report Number 96-007760 assigned                                 17:06:32
HAS COCKER AUTO SALES PLATES ON IT...DRIVER IS STEPFATHER (CGJ)   17:08:53
JEAN L BELL M/B...VEHICLE POSSIBLY IN MILWUAKEE AREA NOW.. (CGJ)  17:09:09

              'RETURN' to proceed: _

                                                  POLICE DISPATCH  1

1. Pri: B305    2. Back:                  |1. Pri:        2. Back:
                                          |
3. Nature: DC-DISORDERLY CONDUCT          |3. Nature:
   Apt:            4. Priority: 3         |   Apt:           4. Priority:
5. Loc: 1216 WISCONSIN AV                 |5. Loc:
 BE   6. Grid: BE81   1098 KEELER AV      |      6. Grid:
 BE5A                 1098 WHITE          |
7. Notes: FEMALE.                         |7. Notes:
8. Lo2:                                   |8. Lo2:
 GENERAL INCIDENT - SEE PAGE 2            |
                                          |
 R 18:57   S 18:57   D 19:04   A 19:14    | R        S        D        A
                                          |
 9. Tag:              St:    Typ:         | 9. Tag:              St:    Typ:
10. DL#:                      St:         |10. DL#:                     St:
11. Descr:                                |11. Descr:
12. Notes:                                |12. Notes:
13. Report:              14. Num:         |13. Report:              14. Num:
15. Code: NR   16. Code:                  |15. Code:      16. Code:
                                          |
  6085579    ENTER:           11:49       |            ENTER:        Active :
 JLJ TLB                      STAT        |                          Waiting:
    'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____

                                                  POLICE DISPATCH  1

Notes for DC-DISORDERLY CONDUCT at 1216 WISCONSIN AV

Primary officer: TILLEY, DANNY M
Time closed: 19:32:31
Disposition 1: NR NO REPORT
GOLDEN THREW A STICK (JLJ)                                        18:57:39
ABOVE PHONE NUMBER IS TO THE NEIGHBORS HOUSE... (JLJ)             18:58:01
TERRY GOLDEN THREW A STICK AT CALLERS BROTHER-TERRY (JLJ)         18:58:20
BROWN..APPARENTLY THIS IS AN ONGOING PROBLEM WITH THE (JLJ)       18:58:30
TWO OF THEM (JLJ)                                                 18:58:33
NO LOCALS ON TERRY GOLDEN (TLB)                                   19:00:41
LOCALS ON TERRANCE A BROWN M/B 11/05/57--UNK IF SAME SUBJ (TLB)   19:02:08
NO LOCALS ON R/P SANDRA JONES (TLB)                               19:03:15
P.D. Response area is BE5A                                        19:04:36
ALL IS OK (TLB)                                                   19:15:08
Unit B305 current location: 1215 WISCONSIN (TLB)                  19:16:16
Remarks from MDT, TILLEY, DANNY M: DISPUTE BETWEEN TERRY BROWN OF 1006 19:28:36
RANDAL AND TERRY GOLDEN OF 1215 WISCONSIN. IT STARTED A COUPLE OF DAYS 19:28:36
AGO AND CONTINUED UNTIL NOW WHEN BROWN SAID GOLDEN HIT HIM WITH A 19:28:36
STICK. OTHERS PEOPLE WHO WERE IN THE AREA REFUSED TO VERIFY BROWNS 19:28:36
ACCOUNT. BROWN SAID HE WOULD TAKE CARE OF IT HIMSELF. I WARNED THAT IF 19:28:36

              'RETURN' FOR MORE LINES, 'X' TO EXIT: _

                                                  POLICE DISPATCH  1

Notes for DC-DISORDERLY CONDUCT at 1216 WISCONSIN AV 05-18
```

HE WAS THE AGRESSOR HE WOULD BE ARRESTED. NO CONTACT WITH GOLDEN AS HE 19:28:36
WAS GONE PRIOR TO MY ARRI .. LEFT MESSAGE AT HIS HOI WITH ELDERLY 19:28:36
FEMALE. 19:28:36

'RETURN' to proceed, 'T' for top: _

POLICE DISPATCH 1

1. Pri: B305 2. Back:

3. Nature: CPS-CIVIL PAPER SERVICE
Apt: 4. Priority: 4
5. Loc: 1216 WISCONSIN AV
BE 6. Grid: BE81 1098 KEELER AV
BE5A 1098 WHITE
7. Notes: d from: 1216 WISCONSIN (CNH)
8. Lo2:

R 16:07 S 16:07 D 16:07 A 16:07

9. Tag: St: Typ:
10. DL#: St:
11. Descr:
12. Notes:
13. Report: 14. Num:
15. Code: NR 16. Code:

6041724 ENTER: 11:50
MDT MDT STAT

1. Pri: 2. Back:

3. Nature:
Apt: 4. Priority:
5. Loc:
6. Grid:

7. Notes:
8. Lo2:

R S D A

9. Tag: St: Typ:
10. DL#: St:
11. Descr:
12. Notes:
13. Report: 14. Num:
15. Code: 16. Code:

ENTER: Active :
Waiting:

'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____

POLICE DISPATCH 1

Notes for CPS-CIVIL PAPER SERVICE at 1216 WISCONSIN AV

Primary officer: TILLEY, DANNY M
Time closed: 16:11:10
Disposition 1: NR NO REPORT 16:07:19
CREATED BY MDT B305 16:11:08
Incident location changed from: 1216 WISCONSIN (CNH)

65-19

'RETURN' to proceed: _

POLICE DISPATCH 1

```
1. Pri: B305    2. Back:                  |1. Pri:          2. Back:
                                          |
3. Nature: CPS-CIVIL PAPER SERVICE        |3. Nature:
   Apt:            4. Priority: 4         |   Apt:             4. Priority:
5. Loc: 1216 WISCONSIN AV                 |5. Loc:
 BE   6. Grid: BE81   1098 KEELER AV      |      6. Grid:
 BE5A                 1098 WHITE          |
7. Notes: d from: 1216 WISCONSIN (CNH)    |7. Notes:
8. Lo2:                                   |8. Lo2:
                                          |
                                          |
 R 15:31   S 15:31   D 15:31   A 15:31    | R         S         D         A
                                          |
 9. Tag:              St:    Typ:         | 9. Tag:              St:    Typ:
10. DL#:                      St:         |10. DL#:                      St:
11. Descr:                                |11. Descr:
12. Notes:                                |12. Notes:
13. Report:          14. Num:             |13. Report:                14. Num:
15. Code: NR  16. Code:                   |15. Code:       16. Code:
                                          |
  6041685   ENTER:          11:51         |            ENTER:          Active :
 MDT MDT                    STAT          |                            Waiting:
    'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____
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POLICE DISPATCH 1

Notes for CPS-CIVIL PAPER SERVICE at 1216 WISCONSIN AV

Primary officer: TILLEY, DANNY M
Time closed: 15:34:01
Disposition 1: NR NO REPORT
CREATED BY MDT B305 15:31:03
Remarks from MDT, TILLEY, DANNY M: NOT HOME. 15:33:21
Incident location changed from: 1216 WISCONSIN (CNH) 15:33:59

'RETURN' to proceed: _

POLICE DISPATCH 1

- - - PRIOR INCIDENTS AT '1216 WISCONSIN AV' - - -

1 8219824 10/17/98 WELF-CHECK WELFARE

105-20

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 2 7028714 02/11/97 CPS-CIVIL PAPER SERVICE
 3 7028108 02/10/97 CPS-CIVIL PAPER SERVICE
 4 6159363 08/06/96 FOL-FOLLOW UP
 5 6159181 08/06/96 FOL-FOLLOW UP
 6 6159136 08/06/96 FOL-FOLLOW UP
 7 6157501 08/04/96 FOL-FOLLOW UP                          96-007760
 8 6154689 07/31/96 AUTO-AUTO THEFT
 9 6085579 04/30/96 DC-DISORDERLY CONDUCT
10 6041724 02/29/96 CPS-CIVIL PAPER SERVICE
11 6041685 02/29/96 CPS-CIVIL PAPER SERVICE
12 6023465 02/04/96 CPS-CIVIL PAPER SERVICE
13 6010210 01/16/96 FOL-FOLLOW UP
14 6009595 01/15/96 CODE-CODE ENFORCEMENT
15 6007547 01/12/96 FOL-FOLLOW UP
16 6006858 01/11/96 THFT-THEFT
17 6005997 01/10/96 FOL-FOLLOW UP
18 5246276
19 5241143

       Enter line number for more info, Back, Top, eXit, 'RETURN': 12_

                                                    POLICE DISPATCH  1

1. Pri: B305    2. Back:                    |1. Pri:          2. Back:
                                            |
3. Nature: CPS-CIVIL PAPER SERVICE          |3. Nature:
   Apt:              4. Priority: 4         |   Apt:             4. Priority:
5. Loc: 1216 WISCONSIN AV                   |5. Loc:
 BE   6. Grid: BE81    1098 KEELER AV       |      6. Grid:
 BE5A                  1098 WHITE          |
7. Notes: d from: 1216 WISCONSIN (KJG)      |7. Notes:
8. Lo2:                                     |8. Lo2:
                                            |
                                            |
 R 16:35   S 16:35   D 16:35   A 16:35      | R         S         D         A
                                            |
 9. Tag:                St:    Typ:         | 9. Tag:                St:    Typ:
10. DL#:                       St:          |10. DL#:                       St:
11. Descr:                                  |11. Descr:
12. Notes:                                  |12. Notes:
13. Report:              14. Num:           |13. Report:              14. Num:
15. Code: NR  16. Code:                     |15. Code:       16. Code:
                                            |
  6023465   ENTER:              11:51       |            ENTER:          Active :
 MDT MDT                       STAT         |                            Waiting:
    'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____

                                                    POLICE DISPATCH  1

Notes for CPS-CIVIL PAPER SERVICE at 1216 WISCONSIN AV

Primary officer: WEBERG, JENNIFER J
Time closed: 16:38:31
Disposition 1: NR NO REPORT                                  16:35:00
CREATED BY MDT B305                                          16:35:06
Incident location changed from: 1216 WISCONSIN (KJG)
```

65-21

'RETURN' to proceed: _

POLICE DISPATCH 1

1. Pri: 3252 2. Back:

3. Nature: FOL-FOLLOW UP
Apt: 4. Priority: 4
5. Loc: 1216 WISCONSIN AV
BE 6. Grid: BE81 1098 KEELER AV
BE5A 1098 WHITE
7. Notes: set on unit 3252 at 10:45:58
8. Lo2:

R 10:29 S 10:29 D 10:29 A 10:29

9. Tag: St: Typ:
10. DL#: St:
11. Descr:
12. Notes:
13. Report: 14. Num:
15. Code: NR 16. Code:

6010210 ENTER: 11:52
MDT MDT STAT
'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____

1. Pri: 2. Back:

3. Nature:
Apt: 4. Priority:
5. Loc:
6. Grid:

7. Notes:
8. Lo2:

R S D A

9. Tag: St: Typ:
10. DL#: St:
11. Descr:
12. Notes:
13. Report: 14. Num:
15. Code: 16. Code:

ENTER: Active :
Waiting:

POLICE DISPATCH

Notes for FOL-FOLLOW UP at 1216 WISCONSIN AV

Primary officer: MARKLEY, JOHN A
Time closed: 10:55:25
Disposition 1: NR NO REPORT

CREATED BY MDT 3252 10:29:29
Incident location changed from: 1216 WISC (MNF) 10:29:29
Unit 3252 current location: 1216 WISCONSIN (MNF) 10:45:46
Timer reset on unit 3252 at 10:45:58 10:45:55
10:45:58

'RETURN' to proceed: _

POLICE DISPATCH

1. Pri: A397 2. Back:

3. Nature: CODE-CODE ENFORCEMENT
Apt: 4. Priority: 4
5. Loc: 1216 WISCONSIN AV

1. Pri: 2. Back:

3. Nature:
Apt: 4. Priority:
5. Loc:
Grid: 15-22

```
BE5A                    1098 WHITE
7. Notes: d from: 1216 WISCONSIN (MLR) |7. Notes:
8. Lo2:                                |8. Lo2:
                                       |
 R 14:36   S 14:36   D 14:36   A 14:36 | R         S         D         A
                                       |
 9. Tag:                St:     Typ:   | 9. Tag:                St:     Typ:
10. DL#:                         St:   |10. DL#:                         St:
11. Descr:                             |11. Descr:
12. Notes:                             |12. Notes:
13. Report:              14. Num:      |13. Report:              14. Num:
15. Code: NR   16. Code:               |15. Code:       16. Code:
                                       |
  6009595    ENTER:            11:52   |              ENTER:          Active :
 MDT MDT                       STAT    |                              Waiting:
    'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____
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POLICE DISPATCH 1

Notes for CODE-CODE ENFORCEMENT at 1216 WISCONSIN AV

Primary officer: ORTIZ, DAVID A
Time closed: 14:41:08
Disposition 1: NR NO REPORT
CREATED BY MDT A397 14:36:04
Incident location changed from: 1216 WISCONSIN (MLR) 14:41:06

'RETURN' to proceed: _

POLICE DISPATCH 1

```
1. Pri: A305    2. Back: A308          |1. Pri:          2. Back:
                                       |
3. Nature: FOL-FOLLOW UP               |3. Nature:
   Apt:            4. Priority: 4      |   Apt:             4. Priority:
5. Loc: 1216 WISCONSIN AV              |5. Loc:
 BE   6. Grid: BE81   1098 KEELER AV   |      6. Grid:
 BE5A                 1098 WHITE        |
7. Notes: set on unit A305 at 13:58:33 |7. Notes:
8. Lo2:                                |8. Lo2:
                                       |
 R 13:24   S 13:24   D 13:35   A 13:43 | R         S         D         A
                                       |
 9. Tag:                St:     Typ:   | 9. Tag:                St:     Typ:
10. DL#:                         St:   |10. DL#:                         St:
11. Descr:                             |11. Descr:
12. Notes:                             |12. Notes:
13. Report:              14. Num:      |13. Report:              14. Num:
15. Code: NR   16. Code: 105-23        |15. Code:       16. Code:
```

6007547 ENTER: 11:02 | ENTER:
CNH KNS STAT | Waiting:
'RETURN'-exit, 'VR'- ew Reports, PRINT, 'N'-no , 'P'-page 2: _____

POLICE DISPATCH 1

Notes for FOL-FOLLOW UP at 1216 WISCONSIN AV

Backup officer: CRALL, J MIKE
Primary officer: WARD JR, LONNIE
Time closed: 14:02:58
Disposition 1: NR NO REPORT

CALLED IN BY DAUGHTER (CNH)	13:24:46
FROM A DIFFERENT LOCATION....DAUGHTER STATED (CNH)	13:25:03
HER MOTHER ASKED HER TO CALL...SHE BELIEVES IT IS (CNH)	13:25:14
ABOUT ITEMS TAKEN FROM THE RESIDENCE A COUPLE DAYS (CNH)	13:25:24
AGO...UNK IF PREVIOUSLY REPORTED.. (CNH)	13:25:32
DAUGHTER ADVISED NO PHONE AT RESIDENCE. (CNH)	13:25:40
!*** Nature changed from THFT THEFT ***	13:26:39
LINKED TO MAIN POLICE INCIDENT # 6006858 01/12/96	13:26:52
CKG PRIORS FIND THAT THERE WAS A THFT REP YESTERDAY (CNH)	13:27:09
WHICH TURNED OUT TO BE CIVIL... (CNH)	13:27:16
P.D. Response area is BE5A	13:35:47
Timer reset on unit A305 at 13:58:33	13:58:33

'RETURN' to proceed: _

POLICE DISPATCH 1

1. Pri: A307 2. Back:	1. Pri: 2. Back:
3. Nature: THFT-THEFT	3. Nature:
Apt: 4. Priority: 4	Apt: 4. Priority:
5. Loc: 1216 WISCONSIN AV	5. Loc:
BE 6. Grid: BE81 1098 KEELER AV	6. Grid:
BE5A 1098 WHITE	
7. Notes: 1216 WISCONSIN AV NATURE FOL	7. Notes:
8. Lo2:	8. Lo2:
R 13:22 S 13:23 D 14:25 A 14:27	R S D A
9. Tag: St: Typ:	9. Tag: St: Typ:
10. DL#: St:	10. DL#: St:
11. Descr:	11. Descr:
12. Notes:	12. Notes:
13. Report: 14. Num:	13. Report: 14. Num:
15. Code: NR 16. Code:	15. Code: 16. Code:
6006858 ENTER: 11:53	ENTER: Active :
JCF KNS STAT	Waiting:

'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____

POLICE DISPATCH 1

Notes for THFT-THEFT at 1216 WISCONSIN AV

Primary officer: CRALL, J MIKE
Time closed: 14:54:27
Disposition 1: NR NO REPORT

FROM HOUSE -- POSS SUSPECT (JCF)	13:23:14
Complainant name changed from: SANRA BELOL (JCF) 125-24	13:23:50

```
THAT ARE MISSING AND SHE FEEL HE MAY HAVE DISPOSEE (JCF)                    13:30:19
OF THE ITEMS (JCF)                                                          13:30:35
THIS APPEARS TO BE CIVIL    NATURE (JCF)                                    13:30:55
P.D. Response area is BE5A                                                  14:25:58
Timer reset on unit A307 at 14:43:21                                        14:43:21
ALL OKAY (KNS)                                                              14:48:06
Remarks from MDT, CRALL, JEFFREY M: BELL BELIEVES HUSBAND SOLD PROPERY      14:53:49
FOR DRUGS, HUSBANDS RESIDENCE ALSO, CIVIL.                                  14:53:49
LINKED TO POLICE INCIDENT @ 1216 WISCONSIN AV NATURE FOL                    13:26:52

                'RETURN' to proceed: _

                                                        POLICE DISPATCH  1

1. Pri: 3252    2. Back:                    |1. Pri:        2. Back:
                                            |
3. Nature: FOL-FOLLOW UP                    |3. Nature:
   Apt:            4. Priority: 4           |   Apt:           4. Priority:
5. Loc: 1216 WISCONSIN AV                   |5. Loc:
 BE   6. Grid: BE81   1098 KEELER AV        |      6. Grid:
 BE5A                 1098 WHITE            |
7. Notes: d from: 1216 WISCONSIN (LNS)      |7. Notes:
8. Lo2:                                     |8. Lo2:
                                            |
 R 10:21   S 10:21   D 10:21   A 10:21      | R        S        D        A
                                            |
 9. Tag:              St:    Typ:           | 9. Tag:             St:    Typ:
10. DL#:                      St:           |10. DL#:                      St:
11. Descr:                                  |11. Descr:
12. Notes:                                  |12. Notes:
13. Report:          14. Num:               |13. Report:                14. Num:
15. Code: NR   16. Code:                    |15. Code:      16. Code:
                                            |
  6005997   ENTER:            11:53        |          ENTER:          Active :
 MDT MDT                      STAT          |                          Waiting:
    'RETURN'-exit, 'VR'-View Reports, PRINT, 'N'-notes, 'P'-page 2: _____

                                                        POLICE DISPATCH  1

Notes for FOL-FOLLOW UP at 1216 WISCONSIN AV

Primary officer: MARKLEY, JOHN A
Time closed: 12:26:37
Disposition 1: NR NO REPORT
CREATED BY MDT 3252                                                         10:21:43
Timer reset on unit 3252 at 10:46:51                                        10:46:51
Incident location changed from: 1216 WISCO                                  12:26:35
                                        NSIN (LNS)
```

65-25

STATE OF WISCONSIN CIRCUIT COURT ROCK COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 98 CF 182

NANCY R. LAMON,

Defendant.

ORDER DENYING POST-CONVICTION MOTION FOR NEW TRIAL

1 Nancy R. Lamon was convicted of armed robbery as a party to the crime. She has filed a motion for post-conviction relief alleging prosecutorial discrimination in utilizing a peremptory jury strike. The court rejects her claims and denies her motion for post-conviction relief.

2. Lamon argues that the prosecution peremptorily struck a perspective African-American juror and by such discrimination violated her right to equal protection as set forth in Batson v. Kentucky, 476 U.S. 79 (1986).

3. The record reflects that the only perspective African-American juror was peremptorily struck.

4. Before the jury was sworn, the prosecution stated its reasons for striking the perspective African-American juror. We must determine whether the prosecutor articulated a race-neutral explanation for the peremptory strike. See Batson, 476 U.S. at 98. The reason given need not rise to the level that would justify a challenge for cause. See Id. at 97; State v. Jagodinsky, 209 Wis.2nd 577, 584 (Ct. App. 1997). The reason must not be pretextual. See Batson, 476 U.S. at 98; United States v. Bentley-Smith, 2 F.3d 1368, 1373 (5th Cir. 1993).

5. The prosecution cited four reasons behind the strike of the juror in question, Mr. Bell. First, the State had prosecuted a number of Bells over the years who were residents of Beloit,

and Mr. Bell lives in Beloit. In response to this the defense argues that Bell is a relatively common name, and that to strike an African-American juror named Bell because of name identity alone is a pretext for striking Mr. Bell for the sole reason that he was an African-American.

6. If this were the only reason given for the strike, the defense might be correct. However, the prosecution was aware that Mr. Bell's address of 1216 Wisconsin Avenue in Beloit is the same residence where there had been a number of police contacts over the years (See Exhibit 1 and transcript page 26). This exhibit shows police were called on January 12, 1996, in which Sandra Bell reported items missing from the residence which she believed her husband sold to purchase drugs; and another time when a step-father named Bell borrowed a vehicle and never returned it.

7. When the venire was asked if anyone had ever been the victim of a crime or had a close friend or relative who had been the victim of a crime (trial transcript page 15), Mr. Bell was silent. The prosecutor had reason to strike Mr. Bell at that point, given her knowledge of police calls at Mr. Bell's residence on reports of a husband stealing property to sell for drugs, and to investigate a theft of an automobile, both involving persons named Bell.

8. It was reasonable for the prosecutor to conclude that Mr. Bell was being less than candid in not mentioning these police contacts in which the victim presumably resided at the Bell residence.

9. The argument of Ms. Lamon seems to suggest that the prosecution had a burden to ask probing questions of Mr. Bell in front of the entire venire to get to the bottom of the discrepancy between what she knew about police contacts at Mr. Bell's residence and Mr. Bell's puzzling testimony which indicated he had no close personal friends or family members who had either been the victim or perpetrator of a crime. Given the police contacts at Mr. Bell's home, it is reasonable from this alone for the prosecutor to determine not to keep him as a juror,

making further personal questions about his home and family the focal point of the voir dire.

10. The fact that the prosecutor did her homework on Mr. Bell is evident by the fact she possessed a computer printout of police contacts at Mr. Bell's home at the time of the voir dire.

11. It is not necessary for her to question Mr. Bell in front of the other jurors for the prosecutor to prove that there was a reason for him to be struck. What is necessary is to show a race-neutral explanation for the peremptory strike, and the prosecutor's suspicion that Mr. Bell evaded answering the question about knowing any victim of a crime is a clear and reasonable race-neutral explanation for the strike. Her rationale for not asking Mr. Bell more pointed questions during voir dire to get to the bottom of the discrepancy, is not a necessary component of a race-neutral explanation for a peremptory strike. Her explanation was legitimate.

12. A perspective juror's failure to mention his likely acquaintance with the victim of a crime, even though the perspective juror lives in a home where police have been called on crime complaints on at least two recent occasions, is enough reason for the strike. The prosecutor logically concluded that that Mr. Bell was not being candid. A prosecutor who believes that a potential juror is less than candid on voir dire has the right to strike the juror on a peremptory strike, regardless of race.

The post-conviction motion for new trial of Nancy R. Lamon, accordingly, is denied.

Dated this 20 day of November, 2000.

BY THE COURT:

Daniel T. Dillon, Circuit Court Judge

71-3

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

No. 00-3403-CR

v.

NANCY R. LAMON,

Defendant-Appellant-Petitioner

ON REVIEW OF THE DECISION OF
THE COURT OF APPEALS, DISTRICT IV,
AFFIRMING THE JUDGMENT OF
THE ROCK COUNTY CIRCUIT COURT,
HONORABLE EDWIN C. DAHLBERG, PRESIDING

APPELLANT'S REPLY BRIEF

TIM PROVIS
Appellate Counsel
Bar No. 1020123

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Madison, Wisconsin 53705
(608) 233-2067

Attorney for Petitioner
NANCY R. LAMON

TABLE OF CONTENTS

TABLE OF CASES

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. No. 00-3403-CR

NANCY R. LAMON,
Defendant-Appellant-Petitioner

ON REVIEW OF THE DECISION OF THE COURT OF APPEALS, DISTRICT IV, AFFIRMING THE JUDGMENT OF THE ROCK COUNTY CIRCUIT COURT, HONORABLE EDWIN C. DAHLBERG, PRESIDING

APPELLANT'S REPLY BRIEF

ARGUMENT

Introduction

The highest Court has repeatedly recognized "[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." Rosales-Lopez v. United States, 451 U.S. 182, 188, 101 S.Ct. 1629 (1981). Specifically, "[v]oir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." J.E.B. v. Alabama, 511 U.S. 127, 143-144, 114 S.Ct. 1419 (1994)(also citing and quoting from U.S. v. Whitt, 718 F.2d 1494, 1497 (10th Cir.1983)("Without an adequate foundation [laid by voir dire], counsel cannot exercise sensitive and intelligent peremptory challenges.")).

The State's argument asks this Court to write an opinion

denigrating this historic importance of voir dire and elevating prosecutors' intuitions over the objective evidence provided during voir dire questioning. Cf. J.E.B., supra, 511 U.S. at 149 (conc.opn. per O'Connor, J.) (noting "litigant's ability to act on this intuition" in exercising peremptories is severely limited by Court's decision). This is not the only flaw in the State's argument.

I. THE FINDINGS OF THE POSTCONVICTION MOTION JUDGE ARE NOT ENTITLED TO ANY DEFERENCE.

The State's argument relies heavily on the findings of the judge who decided the postconviction motion. Respondent's Brief at 5-6, 23, 25, hereinafter RB. Its argument also relies heavily on the opinion in State v. Gregory, 2001 WI App 107, 244 Wis.2d 65, 630 N.W.2d 711. RB 14, 16, 21. Gregory, supra, was a divided opinion and the majority held, inter alia, the decision on a Batson challenge must be made before the jury is sworn so it is proper for a circuit court to refuse to hear a postconviction motion in a Batson case. 2001 WI App 107, ¶14. So if the Court follows Gregory, supra, it must disregard the decision on the postconviction motion here and if the Court gives any weight to the postconviction motion judge's findings, it must overrule Gregory. Thus, the State's argument is contradictory and its brief suggests no way to resolve the contradiction.

The correct approach to this problem is to ignore both Gregory and the findings of the postconviction motion judge. Gregory is distinguishable on its facts since there Mr. Bell did answer questions and so the judge presiding there had an opportunity to judge his credibility whereas here the judge did not. The findings of the postconviction motion judge are not entitled to any deference because that judge never even saw the juror and so had no opportunity to judge his credibility.

II. THE FINDINGS OF THE TRIAL JUDGE ARE NOT ENTITLED TO ANY DEFERENCE.

The State claims appellant Lamon is taking a contrary position on the standard of review issue in this Court by

arguing the trial judge's decision is not entitled to any deference. RB 18. The record belies this claim. In response to the State's claim in its brief in the court below that the trial judge had an opportunity to evaluate the credibility of Mr. Bell's responses, counsel quite clearly argued in appellant's reply brief in that court that the judge's decision was not entitled to any deference because that judge had no opportunity to decide the credibility of Mr. Bell's responses since he was not asked to respond to any questions. Appellant's Reply Brief at 4, hereinafter ARB. So appellant Lamon has not changed her position on this issue and the Court is not barred from considering it.

The State's argument on this point, RB 15-19, implies appellant Lamon is arguing the clearly erroneous standard never applies at the third Batson step. On the contrary, counsel is simply saying that here, where the judge had no opportunity to evaluate the juror's credibility, the basis for according deference to the trial judge does not exist and so here the Court may review de novo. Appellant's Brief in Supreme Court at 8-9, hereinafter AB. This is nothing more than an application of the ancient maxim of jurisprudence, "When the reason for a rule ceases, so should the rule itself." See, e.g., Cal. Civil Code §3510.

The State concludes its argument on the standard of review claiming the trial judge had "ample personal opportunity . . . to evaluate the credibility of . . .[juror] Bell." RB 18. But since Mr. Bell was asked no questions the judge could not evaluate the credibility of his answers. As far as demeanor is concerned, the record does not show the judge made any specific observations of Mr. Bell during voir dire. Even if we assume such observations were made, there is no case, and the State has cited none, holding credibility may be judged on demeanor alone. The State cites and quotes State v. Jimmie R.R., 2000 WI App 5, 232 Wis.2d 138, 606 N.W.2d 196 to imply such a rule, RB 16-17, but this is a selective quote. In the sentence before the one quoted by the State, the Jimmie R.R. court says, "the determination often turns on a prospective juror's '**responses on voir dire** and a circuit court's assessment of the individual's honesty and credibility . . .' " ¶16, emphasis added.

It is "the conclusions of the decisionmaker who **heard and observed** the witnesses" which should not be second guessed. Rosales-Lopez, supra, 451 U.S. at 188, emphasis added. Since the trial court never heard any of Mr. Bell's voir dire responses, its decision is not entitled to any deference on review.

III. THERE WAS NO "FAILURE TO DISCLOSE" BY JUROR BELL.

At the heart of the State's argument, it claims "Bell's failure to disclose during voir dire any police contacts at his residence is a plainly race-neutral justification for striking him." RB 22. The full record of the voir dire belies this claim.

The prosecutor asked specific questions about crime. She began by asking if any juror "had contact with the Rock County District Attorney's Office in any capacity? As a victim, as a witness, as a defendant?" (60:11). She next asked, "Is there anyone who has a close friend or relative who has been the victim of a crime?" (60:15). After two jurors, in answer to this question, volunteered they had relatives who had been convicted of crime (60:16-18), the prosecutor's final voir dire question about crime was, "Are there other people . . . who have a close friend or relative who has been convicted?" (60:18).

So the prosecutor never asked anyone if they had any contact with the police and Mr. Bell's failure to respond to a question no one was asked is not a failure to disclose.

The problem arose here because when the prosecutor argued the defense of her strike to the trial court she exaggerated the questions she asked. She said Mr. Bell "did not respond to any of the questions about having contact . . . with law enforcement officers." (60:26). But she never asked anyone any questions about contact with law enforcement officers.

Furthermore, the exhibit of police contacts at the juror's residence does not show Mr. Bell failed to disclose anything, either. Again, the three questions the prosecutor asked the panel were (1) whether anyone has contact with the D.A.'s office as a victim, witness or defendant (60:11); (2) whether anyone had a close friend or relative who was a crime victim (60:15) and (3) whether anyone had a close friend of relative who had been convicted of crime. (60:18).

The exhibit does not show anyone was arrested, prosecuted or convicted of crime. So it does not show Mr. Bell was failing to disclose an answer to the prosecutor's third question. The exhibit does not show Mr. Bell himself was involved in any crime in any way. So it does not show Mr. Bell was failing to disclose an answer to the prosecutor's first question.

The only relevant information the exhibit does contain is, as the prosecutor pointed out, "one complaint of a woman indicating that her husband had stolen her vehicle" (60:26). But what the prosecutor did not tell the court is the contents of the two follow up reports on this complaint. The first one, RB App 107, says "RP HAS POSS INFO ON NAMES OF SUSPECT," which tends to indicate someone other than Mrs. Bell's partner was suspected and the second one, RB App 106, says "KIDS HAVE BEEN THROUGH ENOUGH, VEHICLE HAS BEEN RECOVERED," indicating the complaint against whomever had been withdrawn.

So, again, when the prosecutor told the trial court that complaint "would constitute being a victim of crime and certainly perhaps being convicted" (60:29), she was exaggerating the evidence. So the exhibit does not show Mr. Bell was failing to disclose an answer to the prosecutor's second question (about relatives as victims) since he may have honestly believed this was not a crime but a domestic dispute since there was no arrest or he may have known nothing about it because he wasn't living there at the time.

But more importantly, when white jurors told the prosecutor they had relatives who had been victims of crime (60:15-16), the prosecutor asked them questions about the

matters to see if they could be impartial jurors. Id. If the prosecutor thought Mr. Bell had a relative who was a victim of crime, why didn't she ask him the same questions? Is it because she had prejudged his ability to be impartial?

Finally, what the prosecutor did not present as an exhibit to the court is also significant. Persons convicted of felonies are not eligible to serve on juries. §756.02, Stats. Prosecutors routinely run the names of prospective jurors through their criminal justice databases so they can disqualify such persons from jury service. If someone living at Mr. Bell's residence had a rap sheet, why didn't the prosecutor present it instead of her contacts exhibit which never proved what she claimed for it?

IV. THE OTHER REASONS SUGGESTED FOR THE STRIKE ARE ALL TOO OFTEN JUST CODE WORDS FOR DISCRIMINATION.

The State argues appellant has neglected other relevant circumstances in the totality and claims they also justify the trial court's decision. RB 8, 20-23.

As to Mr. Bell's last name showing he was part of a "crime family," counsel has already pointed out the error in such an unfounded assumption. AB 11. Bell is simply too common a name upon which to base an assumption of relationship. Is Mr. Bell also related to Alexander Graham Bell simply because their last names are the same?

As to Mr. Bell's residence in a "high crime area," this is just another way of saying Mr. Bell lives in a black neighborhood. The courts recognize that "residences, especially in urban centers, can be the most accurate predictor of race . . ." U.S. v. Bishop, 959 F.2d 820, 828 (9th Cir.1992). Residence in such a neighborhood without more, is just "a stereotypical racial reason." Id. at 827. The prosecutor never demonstrated any connection between Mr. Bell's residence and the events of this crime.

As to Mr. Bell's employment as "varied," this is just another way of saying blacks are often subject to employment

discrimination. "Because there is a far greater percentage of unemployed minorities than there are unemployed persons in the general population . . . Peremptory strikes on the basis of unemployment should be considered suspect." Wylie v. Vaughn, 773 F.Supp. 775, 777 (E.D.Pa.1991).

Of course, the overriding reason none of these suggested justifications for the strike pass muster is the prosecutor's failure to voir dire Mr. Bell on them combined with her stated reason she thought he would lie. This shows these asserted justifications were not "genuine." Purkett v. Elem, 514 U.S. 765, 769 (1995) (inquiry at step three is directed to the "genuineness" of the reason for the strike).

Lastly, in perhaps the most ridiculous claim of all, the prosecutor told the trial court she didn't want to individually voir dire Mr. Bell because it would "single him out." (60:30). But she had just finished asking all the white jurors who had mentioned relatives as crime victims or defendants individual questions on that subject!! (60:15-18). So if she had asked Mr. Bell individual questions, he wouldn't have been singled out. He would simply have gotten the same treatment the white jurors got.

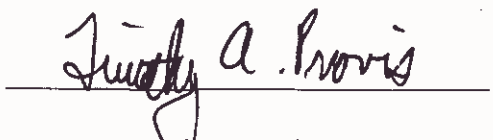
Conclusion

The State concludes its argument claiming no proof of discrimination whatsoever against black juror Bell was shown. RB 29. "As with any inquiry into a person's state of mind, this is an especially difficult determination to make because there are rarely occasions where there is direct proof in the form of a [person] explicitly admitting prejudice . . ." Jimmie R.R., 2000 WI App 5, ¶16. Here, the prosecutor admitted she had prejudged Mr. Bell's credibility. This, combined with her exaggerations and differential treatment in questioning clearly supports an inference of discrimination.

Counsel respectfully submits the foregoing demonstrates the State's arguments are without merit and the Court should reverse and remand for a new trial.

Dated: December 12, 2002

Respectfully submitted,



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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

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Dated: 12/12/02.

Signed,

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